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IN DEFENSE OF NONCAPITAL HABEAS: A RESPONSE TO HOFFMANN AND KING

John H. Blume,[†] Sheri Lynn Johnson^{††} & Keir M. Weyble^{†††}

For decades, federal habeas corpus review of state court judgments has generated wide-ranging, sometimes heated, debate among judges, policymakers, and scholars. In their 2009 Essay, Rethinking the Federal Role in State Criminal Justice, Professors Joseph L. Hoffmann and Nancy J. King added their voices to the exchange, contending that federal habeas corpus review of noncapital state court convictions and sentences should, with narrow exceptions, be abolished. They contend that the expenditure of money, time, and effort necessary to provide review in such cases is no longer justifiable and that those resources should be redirected to creating a federal initiative for improving trial-level representation in which states could choose to participate.

This Article begins with a systematic examination of Hoffmann and King's arguments for the abolition of noncapital habeas corpus review. It demonstrates that although state postconviction review systems may have evolved since the 1960s, federal habeas corpus continues to play an important role in encouraging meaningful state court review and providing a safety net for deserving prisoners whom the state courts have failed. It next explains that Hoffmann and King's proposal for near-abolition of noncapital habeas review would be unlikely to yield substantial net reductions in habeas litigation, both because many prisoners (correctly or incorrectly) would invoke the statutory exceptions and because many others would litigate the adequacy of state postconviction review under the Suspension Clause. This Article then challenges the assumption that states would respond to the abolition of noncapital habeas review by voluntarily improving their own systems for delivering adequate trial-level representation absent an affirmative incentive to do so. Finally, it suggests an alternative set of reforms, beginning with reducing the United States' extraordinarily high incarceration rate and modifying three areas of existing habeas law, to improve the efficiency and effectiveness of habeas corpus review in noncapital cases.

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INTRODUCTION

Before being charged with burglary, assault, and multiple counts of rape, Clarence Moore lived quietly with his wife and three children in the small community of Town Bank, New Jersey.¹ A decade earlier, Moore had been arrested and convicted for a marijuana charge (and fifteen years earlier for a string of burglaries),² but by the time he was accused of rape, he owned a small masonry-contracting business, was an active member in his church, and ran a boxing program for boys.³

The evidence against Moore was equivocal at best. Because the attack occurred in the dark, the rape victim, who was white, could not describe her attacker and was unable to identify Moore, a black man, until after her memory was "hypnotically refreshed."⁴ Little other evidence implicated Moore, who lived approximately forty-five minutes away from the crime scene.⁵ Moore's wife testified for the defense, explaining that although she did not specifically recall the night in question, Moore's absence from home during the early morning hours would have been memorable because the couple's newborn

¹ See L. Stuart Ditzen, *Findings of Racism Reopen '86 Rape Case*, PHILA. INQUIRER, July 1, 2001, at A1.

² *Moore v. Morton*, 255 F.3d 95, 102 (3d Cir. 2001).

³ See Ditzen, *supra* note 1.

⁴ *Moore*, 255 F.3d at 97-98.

⁵ See *id.*

child was very sick at that time and Moore played an active role in the child's care.⁶

Perhaps because of the shakiness of the case, the prosecutor's closing argument included remarks that every reviewing court agreed were egregiously improper. After claiming that he was not making an argument about race, the prosecutor continued at length about the purported relevance of Moore's marriage to a white woman; according to the prosecutor, the race of Moore's wife reflected his sexual preference for white women, thus supporting the inference that he indeed raped the victim.⁷ Moore's counsel interrupted, objecting and requesting a mistrial. Instead, the trial court gave a general instruction to disregard the prosecutor's remarks.⁸ Then, without offering any supporting evidence, the prosecutor argued that Moore had been in need of "sexual release," as Moore's wife had mastitis and was busy

⁶ *Id.* at 98.

⁷ The prosecutor argued:

Race has nothing whatsoever to do with this case, right? Right. We all know that the race of the people involved does not at all dictate whether he's guilty or anything like that. I mean, let's hope that we all feel that way, whether we are white or black or anything. Okay? So let's clear the air that the statement that I'm about to make has nothing whatsoever to do—and I hope this machine hears this—has nothing whatsoever to do with race.

This has to do with selection, okay? Here's what I mean. All of us select people in life to be with based on whatever reason, whether it's people to marry, whether it's friends, whether it's people to associate with, whether it's business people. We all make choices in life that lead us to relationships with others, and those choices may or may not be significant.

Let me show you what I mean. What if you as an individual, whether you're male or a female, decide in your life that you want to live your life with a blonde? You know, you see all of these ads about blondes have more fun and this and that and, again, whether you are male or female or whatever—it can work both ways—and so you become interested in being with blondes because you prefer them. Right? Gentlemen prefer blondes.

Well, that can be seen, can't it, because maybe the people that you choose to date or marry or be with all appear to be blondes or it might be redheads or it might be green hair. You know, nowadays I guess green is one of the popular colors. It could be anything. You could substitute any color hair or you could substitute any particular trait. Right? It needn't even be color of hair. It could be the color of eyes. It could be a person who likes tall people. I think whoever I should be with should be six foot four. It would make me feel terrific to be with a woman six foot four, or vice versa, a woman could think of a man like that.

You see my point? It's not a statement of race; it's a question of choice, selection of who you might want to be with, whether it is as a mate or a boyfriend or girlfriend or victim. How about that? How about that some people might choose a victim according to the way they look, whether they be blonde or blue or anything else?

So I ask you this: What did we learn when we found out that Cheryl Moore was the wife of the defendant? I suggest to you in a nonracist way that what we found out was that Clarence McKinley Moore made a choice to be with a Caucasian woman—

Id. at 99.

⁸ *Id.* at 100.

caring for their sick newborn.⁹ Finally, he declared that if the jury refused to believe the victim's testimony—including her hypnotically induced identification—it would be “perpetrating a worse assault” on her than the rapist had.¹⁰

Moore was convicted and sentenced to life imprisonment. In upholding the conviction, the state appellate court admitted it would “be derelict if [it] did not express [its] disapproval in the strongest terms” but found that the judge's curative instructions were sufficient to combat the error.¹¹ Moore continued to maintain his innocence but had no new evidence to offer. When advanced DNA technology became available, Moore sought testing of the biological evidence deemed too small to test at the time of trial—but the state replied that the evidence had been lost. After fifteen years in prison, Moore had lost all remnants of his former life.¹² He had sold his business and his house to pay his legal bills.¹³ His wife, despite her belief in his innocence, had moved on.¹⁴ His youngest child had died, and his two other children had become adults.¹⁵

The Third Circuit Court of Appeals, however, concluded that in the context of the very shaky evidence against Moore, the prosecutor's closing argument denied Moore a fundamentally fair trial.¹⁶ When his attorney delivered the news, Moore “collapsed in his arms.”¹⁷ Ultimately, the county prosecutor dismissed the indictment against Moore when the New Jersey Supreme Court determined that hypnotically refreshed testimony was no longer admissible in New Jersey courts.

The constitutional errors that tainted Clarence Moore's rape trial were not redressed by the state judge who presided over that proceeding, nor were they redressed by the state appellate court justices who reviewed his conviction. Rather, these errors—profound enough to violate guarantees made in the Bill of Rights and harmful enough to have deprived him of his right to a fair trial—were only remedied because a federal court exercised its habeas corpus jurisdiction. For Clarence Moore and many others that the state court process has failed, habeas review in an Article III federal court has long been the last—and sometimes best—chance to prove constitutional error and secure a remedy. Whether attributable to overworked or underskilled

⁹ *Id.* at 100–01.

¹⁰ *Id.* at 101.

¹¹ *Id.* at 108 (quoting *State v. Moore*, No. A-1910-87Ta, slip op. at 7 (N.J. Super. Ct. App. Div. Apr. 1, 1991)).

¹² See Ditzen, *supra* note 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *Moore*, 255 F.3d at 121.

¹⁷ L. Stuart Ditzen, *Reclaiming the Innocent*, PHILA. INQUIRER, July 31, 2001, at D1.

counsel; to the absence of any counsel at all; to judges lacking the requisite time, interest, or will; or to a host of other variables, the undeniable fact is that many harmful constitutional errors survive state court review undetected and uncorrected. In those cases, detection and correction come through federal habeas review, if they come at all.

In their 2009 essay, Professors Hoffmann and King propose to eliminate federal habeas review for all but a select few state prisoners not under sentence of death.¹⁸ Relying on an empirical study of habeas litigation in the federal district courts,¹⁹ Hoffmann and King conclude that habeas review of state court judgments in noncapital cases generally yields no appreciable benefits, costs too much, and should therefore be eliminated for all but a narrow set of cases involving extraordinary circumstances.²⁰ They further propose—but not as a quid pro quo—that states redirect the savings realized from shutting down the existing noncapital habeas apparatus to a new federal initiative through which states could, on a voluntary basis, seek assistance in strengthening their own mechanisms for preventing and correcting errors in criminal cases.²¹ These proposals also form the basis of a book currently in draft form.²²

Although the existing system of habeas review for noncapital cases is not without problems and could be improved in a variety of ways, Hoffmann and King's assessment of its utility—present and potential, practical and symbolic—both underestimates the importance of rectifying cases of horrendous error and rests on a set of assumptions that we believe do not comport with the reality of contemporary postconviction litigation. Similarly, their proposal for offsetting elimination of the present system through voluntary enhancement of state systems assumes a level of institutional and political will that the states, despite strong recent incentives in the closely analogous context of capital habeas corpus, have yet to, and in our view will never, exhibit.

In this Article we will examine Hoffmann and King's proffered justifications for condemning the present noncapital habeas system and explain why that system is neither as redundant nor as useless as they suggest. We will also critique their proposed exceptions for cases

¹⁸ See generally Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009) (proposing to permit habeas review for state prisoners in noncapital cases upon a showing of "clear and convincing" evidence of actual innocence or for a claim based on a new, retroactive constitutional rule).

¹⁹ NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

²⁰ See Hoffmann & King, *supra* note 18, at 806, 820.

²¹ See *id.* at 823–25, 828–34.

²² Nancy J. King & Joseph L. Hoffmann, *Habeas Corpus for the Twenty-First Century*, Chapter One 14–15 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory Working Paper No. 09-27), available at <http://ssrn.com/abstract=1517840>.

presenting extraordinary circumstances and explain why Hoffmann and King's suggestions for reallocating the resources that would purportedly be saved by barring the federal courthouse door are unrealistic and unworkable. Finally, we will suggest a quite different set of changes to habeas corpus—revisions that we believe address the real ills of noncapital habeas today.

I

A BRIEF DESCRIPTION OF NONCAPITAL HABEAS CORPUS

Since 1867, the writ of habeas corpus has been available to state prisoners "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."²³ In *Brown v. Allen*,²⁴ the Supreme Court ushered in the modern era of federal habeas corpus, making clear that constitutional challenges to state prisoners' convictions are cognizable and subject to independent review in habeas proceedings regardless of whether those challenges were previously rejected in a full and fair state court proceeding.²⁵ A decade later, a trio of Supreme Court decisions set the high-water mark for habeas review of state court judgments, authorizing federal review of claims not previously presented to a state court,²⁶ allowing for fact development in federal habeas proceedings,²⁷ and permitting prisoners to file more than one habeas petition challenging the state court judgment underlying their custody.²⁸ These developments, in combination with the Warren Court's historic expansion of the constitutional protections guaranteed to state criminal defendants, made federal habeas corpus a viable and popular forum for challenging state convictions and sentences on an ever-increasing variety of grounds.²⁹

In the mid-1970s, the tide of expansive federal habeas review of state court judgments began to recede. Slowly but steadily, the robust, de novo review of state court judgments that the Warren Court estab-

²³ Act of February 5, 1867, ch. 28, 14 Stat. 385. Additionally, the Constitution itself prohibits suspension of the "privilege of the writ of habeas corpus." U.S. CONST. art. I, § 9, cl. 2.

²⁴ 344 U.S. 443 (1953); see also LARRY W. YACKLE, *POSTCONVICTION REMEDIES* §§ 19–20 (1981) (discussing the history of habeas corpus and the significance of *Brown*).

²⁵ See *Brown*, 344 U.S. at 458.

²⁶ See *Fay v. Noia*, 372 U.S. 391, 426–34 (1963) (holding that federal courts have the authority to review claims that were procedurally defaulted in state court).

²⁷ See *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963) (holding that federal courts must hold evidentiary hearings if the state court's fact-finding process was defective).

²⁸ See *Sanders v. United States*, 373 U.S. 1, 17 (1963) (holding that petitioner can, under a variety of circumstances, file more than one petition for habeas relief).

²⁹ See Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 1012 (1991) ("[T]he Warren Court chose the indirection of habeas review to enforce state compliance with the new criminal process requirements.").

lished gave way as first the Burger Court and then the Rehnquist Court announced a series of rules favoring the promotion of comity between federal and state courts and the protection of states' interests in the finality of their judgments, particularly those imposed in capital cases. Over the ensuing two decades, this systematic campaign of judicial limitations on federal habeas review included, among other things: preclusion of Fourth Amendment claims absent proof that the state courts failed to provide "an opportunity for full and fair litigation" of the issue;³⁰ replacement of *Fay v. Noia*'s liberal waiver rule with a strict procedural-default rule barring consideration of claims not properly preserved in state court absent a showing of "cause and prejudice";³¹ expansion of the circumstances under which a federal habeas court must presume the correctness of a state court's factual findings;³² implementation of a "total exhaustion" rule generally prohibiting federal courts from adjudicating habeas petitions containing a mixture of exhausted and unexhausted claims;³³ creation of a nonretroactivity doctrine barring federal habeas courts, in all but the rarest of cases, from announcing or applying a new rule of criminal procedure;³⁴ significant restrictions on a federal court's ability to entertain a second or subsequent federal petition;³⁵ new limitations on a federal court's authority to permit development of the factual basis of a prisoner's claim;³⁶ and adoption of a stringent harmless error standard for use in determining whether the presence of constitutional error requires issuance of the writ of habeas corpus.³⁷

Congress became a player in the habeas-limitation game with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).³⁸ As its title suggests, AEDPA's primary goal was to simultaneously reduce

³⁰ *Stone v. Powell*, 428 U.S. 465, 482 (1976).

³¹ See *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977).

³² See *Sumner v. Mata*, 449 U.S. 539, 551 (1981).

³³ *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

³⁴ See *Teague v. Lane*, 489 U.S. 288, 310–15 (1989) (plurality opinion) (allowing retroactive application of a rule of criminal procedure on collateral review only when it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or when its absence would "undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction" (internal quotations omitted)).

³⁵ See *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (applying the cause-and-prejudice requirement to claims otherwise subject to dismissal under the abuse-of-the-writ doctrine).

³⁶ See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11–12 (1992) (adopting the "cause-and-prejudice" requirement for determining petitioner's entitlement to a federal evidentiary hearing).

³⁷ See *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) (adopting a harmlessness standard for trial-type errors, under which relief is permitted only where an error had "substantial and injurious effect or influence in determining the jury's verdict").

³⁸ Pub. L. No. 104-132, 110 Stat. 1214. For a description of prior efforts at habeas-statute modification, see, for example, Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2350–73 (1993).

the number of successful habeas challenges in state capital cases while accelerating the pace at which federal courts adjudicate those challenges.³⁹ To that end, Congress revised the habeas statutes applicable to both capital and noncapital cases to include, among other provisions: a one-year period of limitations for state prisoners seeking federal habeas relief;⁴⁰ a new limitation on habeas relief requiring that a prisoner demonstrate not only harmful constitutional error but also that the state court's failure to remedy that error was either contrary to established law, or legally or factually unreasonable;⁴¹ tighter restrictions on the availability of fact development in federal court;⁴² and a nearly insurmountable bar against second or successive applications for habeas relief.⁴³

As it exists today, federal habeas corpus presents state prisoners with an opportunity that is procedurally complex, sometimes elusive, often frustrating, endlessly tantalizing, and occasionally—albeit somewhat unpredictably—rewarding. To make his claims eligible for review, a prisoner must ensure that the claims rely upon federal law,⁴⁴ are exhausted through fair presentation in a full round of state court review,⁴⁵ and arrive in federal court before the statutory limitations period expires.⁴⁶ Once in federal court, the prisoner seeking fact development must prove that he is not at fault for the inadequacy of the existing factual record and that his allegations, if proven, would entitle him to relief.⁴⁷ A prisoner proceeding only on the state court record must show that constitutional error occurred at his state court

³⁹ For an assessment of AEDPA's success in meeting these objectives, see John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 274–92 (2006).

⁴⁰ See 28 U.S.C. § 2244(d) (2006). AEDPA also made available a 180-day limitations period for capital cases from qualifying states. See *id.* § 2263. To date, however, no state has qualified to invoke it. See *infra* notes 184–86 and accompanying text.

⁴¹ 28 U.S.C. § 2254(d).

⁴² *Id.* § 2254(e)(2).

⁴³ *Id.* § 2244(b).

⁴⁴ *Id.* § 2254(a).

⁴⁵ See *id.* § 2254(b); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) (per curiam) (“[E]xhaustion of state remedies requires that petitioners fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” (second alteration in original) (internal quotations omitted)).

⁴⁶ See 28 U.S.C. § 2244(d).

⁴⁷ See *id.* § 2254(e)(2); *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.”); *Williams v. Taylor*, 529 U.S. 420, 440 (2000) (finding that the petitioner was entitled to a federal evidentiary hearing because he was diligent in his attempts to develop the factual bases for his prosecutorial-misconduct and juror-bias claims in state postconviction proceedings).

trial,⁴⁸ that the error was prejudicial⁴⁹ (or structural⁵⁰), and that the last state court to reject the claim did so by ignoring the applicable clearly established federal law,⁵¹ unreasonably applying that law, or unreasonably determining the facts in light of the evidence before it.⁵² For noncapital prisoners who succeed (usually *pro se*) in running this gauntlet, the reward is a proverbial “day in court” with an Article III judge. Some individuals go on to win a new trial or outright freedom, while many others achieve neither, as discussed below. Win or lose, however, noncapital state prisoners who pursue habeas relief both contribute to the development of federal constitutional law and sustain the operation of what we regard to be a critical systemic safeguard.

II

HOFFMANN AND KING’S CASE FOR CONDEMNING THE EXISTING SCHEME OF NONCAPITAL HABEAS REVIEW

Hoffmann and King advance three main reasons for scrapping noncapital habeas review for most prisoners: first, that conditions in the state courts have improved to such an extent since the 1960s that the deterrent and safety-valve functions that federal habeas review performs are no longer necessary; second, that the proportion of noncapital petitioners who win relief is so low that the availability of habeas review produces no meaningful benefits and generates no discernable deterrent effect on state courts; and third, that any negligible benefits the system does produce simply cost more than they are worth. We will examine these reasons in turn.

⁴⁸ 28 U.S.C. § 2254(a).

⁴⁹ *See, e.g.*, *Fry v. Pliler*, 551 U.S. 112, 121–22 (2007); *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995) (concluding that the suppression of favorable evidence by the prosecution violates due process “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different” (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985))); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding that a prisoner claiming ineffective assistance of counsel must show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).

⁵⁰ *See Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) (distinguishing “structural” from trial errors as those that prevent a “criminal trial [from] reliably serv[ing] its function as a vehicle for determination of guilt or innocence”).

⁵¹ *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion); *see* 28 U.S.C. § 2254(d)(1) (prohibiting issuance of the writ unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court”).

⁵² 28 U.S.C. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 390–99 (2000) (construing and applying § 2254(d)’s limitation on habeas relief).

A. The Claim That Federal Habeas Review Is No Longer Necessary

According to Hoffmann and King, the deterrence that the prospect of federal habeas review once provided is no longer necessary, both because “all states have developed appellate and collateral review procedures that provide defendants an opportunity to litigate their constitutional claims”⁵³ and because the “particular structural and systemic problems . . . [of] the 1960s have largely dissipated.”⁵⁴ Hoffmann and King offer no empirical support for either of these assertions, and each assertion is problematic in a way that undercuts the conclusion that deterrence is no longer necessary.

1. *The Availability of State Collateral Review*

It is true that all states offer some form of direct and collateral review of noncapital cases. Before the existence of these state court systems can justify elimination of federal habeas review, however, some attention must be paid to how well they actually work. Hoffmann and King expressly avoid this question, noting that they “make no empirical claims about the effectiveness of present state appellate and postconviction review processes for addressing federal constitutional claims.”⁵⁵ Our own experience and study indicate that although the answer depends on many variables, in general, truly meaningful access to state review procedures—particularly state postconviction review—is, in many states, often quite difficult to come by.

Like any form of litigation, a successful collateral challenge to a criminal conviction requires certain basic tools, such as competent and diligent counsel, discovery, investigative and expert services, and a fair forum in which to present evidence and advocate for a particular result.⁵⁶ In many places in this country, however, one or more of

⁵³ Hoffmann & King, *supra* note 18, at 795.

⁵⁴ *Id.* at 796; *see also id.* at 805 (“Retaining that system might make sense today if the problems that gave rise to it persisted, but they do not.”); *id.* at 842 (“But in every state the combination of appellate and postconviction review provides at least a reasonable opportunity for convicted defendants to litigate both (1) claims of constitutional error based in the trial court record and (2) constitutional claims that require the development of facts outside of that record.”). Empirical evidence suggests that, especially in capital cases, a state’s method of selecting judges affects state appellate court outcomes. Partisan judicial elections are linked to higher affirmance rates in capital cases. *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 488–92 (1999); *see also* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 324–26 (1997) (describing various negative effects of political pressures and distortions on the “independence, integrity, and impartiality of the judiciary”).

⁵⁵ Hoffmann & King, *supra* note 18, at 836.

⁵⁶ *See* John H. Blume & Emily C. Paavola, *A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina*, 4 CHARLESTON L. REV. 223, 249–57 (2010) (providing an

these critical elements is unavailable to the noncapital postconviction applicant as a matter of law or practice. For example, many states do not provide for the appointment of counsel to assist an incarcerated prisoner in a noncapital collateral challenge, no matter how serious his allegations and no matter how incapable he is of presenting his own case pro se.⁵⁷ In other states, limited or qualified rights to postconviction counsel do exist, but other factors, such as an absence of minimum qualification requirements for counsel or extremely low compensation rates, often result in the appointment of lawyers who neither know nor care about what they are doing and cannot afford to perform any better.⁵⁸

Barriers that prevent meaningful access to fact-development resources present equally serious problems for the noncapital postconviction applicant. As any experienced criminal-trial or postconviction lawyer knows, probative evidence can be difficult to obtain, not because it does not exist, but because it is either in the hands of unknown persons or entities, or under the control of persons unwilling to turn it over. Moreover, sometimes this evidence cannot be understood or utilized without the assistance of an expert. In the ordinary civil case, the help of professional investigators, the use of discovery procedures, and the consultation with hired experts can help a party overcome these challenges. For many state prisoners, however, these basic tools of fact development are beyond reach.⁵⁹ Instead, the prisoner—assuming he is competent and sophisticated enough to do so—must attempt to conduct his own investigation from inside a prison cell. Needless to say, these efforts are rarely effective.⁶⁰

The state prisoner must also contend—sometimes more than figuratively—with the state court judge. More likely than not, the judge

overview of state-specific practices); see also 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 7.1(a) (5th ed. 2005).

⁵⁷ See, e.g., *Gibson v. Turpin* 513 S.E.2d 186, 188–89 (Ga. 1999) (finding that the Georgia statute providing for habeas relief does not require appointment of a state-funded lawyer); see also Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006) (discussing the various state approaches to providing representation); Sarah L. Thomas, Comment, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1152–58 (2005) (same).

⁵⁸ For an example of one such state statute, see Uniform Post-Conviction Procedure Act, S.C. CODE ANN. §§ 17-27-10 to -160 (2003 & Supp. 2009). See also Thomas, *supra* note 57, at 1152–58.

⁵⁹ Virtually all prisoners are indigent. Most states provide little or no funding for investigative and expert services, see, e.g., GA. CODE ANN. § 9-14-42 (2006), and most states either do not provide for discovery or have strict limits on discovery, see, e.g., S.C. CODE ANN. § 17-27-150(A) (2003) (allowing discovery only upon a showing of “good cause”).

⁶⁰ See generally Christopher Flood, *Closing the Circle: Case v. Nebraska and the Future of Habeas Reform*, 27 N.Y.U. REV. L. & SOC. CHANGE 633, 640–45, 656–662 (2002) (describing the inadequacies of state postconviction procedures and arguing for the recognition of a prisoner’s constitutional right to adequate state postconviction review).

is a former prosecutor, legislator, or corporate lawyer with strong ties to the local political power structure. To obtain a seat on the bench, the judge will have either won a popular election⁶¹ or been selected by the legislature or the executive.⁶² To keep that seat on the bench—particularly the trial-level bench, from which state postconviction judges typically preside—the judge must keep a large case load moving, keep costs down, and avoid being labeled “soft on crime.”⁶³ None of these imperatives improves an indigent postconviction litigant’s odds of persuading the local judge to authorize funding for investigative or expert services, to order production of evidence, or to resolve disputed legal or factual issues in ways that lead to a grant of relief from a criminal conviction.

The consequences of proceeding without access to competent counsel (let alone with no counsel at all) and relevant evidence, and doing so before a judge not disposed to ease a convicted criminal’s burden, are often severe. In many states, the rules making these basic litigation ingredients unavailable to noncapital inmates are accompanied by other rules barring an evidentiary hearing in the absence of a factual showing that the prisoner lacks the wherewithal to make⁶⁴

⁶¹ Twenty-one states currently have judicial elections. See *Fact Sheet on Judicial Selection Methods in the States*, A.B.A., www.abanet.org/leadership/fact_sheet.pdf (last visited Jan. 11, 2011). For analysis of due process concerns arising from the election of state court judges, see MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 248–50 (3d ed. 2004) (discussing due process implications in light of *Republican Party of Minn. v. White*, 536 U.S. 765 (2002)).

⁶² In Connecticut, New Hampshire, South Carolina, and Virginia, the state’s general assembly elects judges. CONN. CONST. art. V, § 2 (“The judges of the supreme court and of the superior court shall, upon nomination by the governor, be appointed by the general assembly”); N.H. CONST. art. XLVI (“All judicial officers . . . shall be nominated and appointed by the governor and council”); S.C. CONST. art. V, § 3 (“The members of the Supreme Court shall be elected by a joint public vote of the General Assembly”); *id.* art. V, § 8 (“The members of the Court of Appeals shall be elected by a joint public vote of the General Assembly”); VA. CONST. art. VI, § 7 (“The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of twelve years. The judges of all other courts of record shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of eight years.”).

⁶³ Blume & Eisenberg, *supra* note 54, at 470–74 (discussing political campaigns aimed at ousting individual judges for being “soft on crime”).

⁶⁴ Mississippi and Ohio, for example, require detailed proffers before the court will grant an evidentiary hearing. See, e.g., *Spencer v. State*, 2007-CP-01667-COA (¶ 13) (Miss. Ct. App. 2008) (“A trial court enjoys wide discretion in determining whether an evidentiary hearing should be granted. . . . [W]here the trial court summarily dismisses the post-conviction relief claim, it does not have an obligation to render factual findings and [the Mississippi Court of Appeals] will assume that the issue was decided consistent with the judgment and [these findings] will not be disturbed on appeal unless manifestly wrong or clearly erroneous.” (last alteration in original) (internal quotations omitted)); *Jones v. State*, 2000-CP-01712-COA (¶ 3) (Miss. Ct. App. 2001) (“Not every motion for post-conviction relief must be afforded a full adversarial hearing by the trial court. The movant must demonstrate, through affidavits or otherwise, the potential existence of facts that, if proven at the hearing, would entitle the movant to relief.”); *State v. Harrington*, 172 Ohio App. 3d

and/or other rules that treat as defaulted claims the prisoner could not, or did not know to, raise at an earlier time.⁶⁵ Put simply, many prisoners cannot secure a state court hearing or preserve their right to further review without making an evidentiary showing, and they cannot make that evidentiary showing without access to counsel or fact-development tools. While some prisoners manage to duck this one-two punch and obtain something close to meaningful review of their collateral challenges, many more get hit flush. For them, what passes for state postconviction review hardly constitutes “a reasonable opportunity . . . to litigate . . . constitutional claims that require the development of facts outside of that record.”⁶⁶

Hoffmann and King might answer this tale of state court woe by noting that state prisoners face some of the same challenges—plus other, arguably more daunting ones—in federal habeas. If so, they would be correct in that assertion. Federal habeas proceedings do not provide an automatic right to appointed counsel, funding for fact development, or an evidentiary hearing in noncapital federal habeas proceedings. And many additional barriers—e.g., the one-year limitations period,⁶⁷ the exhaustion and procedural default doctrines,⁶⁸ the

595, 2007-Ohio-3796, 876 N.E.2d 626, at ¶ 12 (“[T]he mere filing of a petition for postconviction relief does not automatically entitle the petitioner to an evidentiary hearing. Rather, the trial court need only conduct an evidentiary hearing when the petition, its supporting documents, and the record reveal that the petitioner has set forth sufficient operative facts to establish substantive grounds for relief.”).

Alabama requires that any and all claims be pled with a specificity that few counseled, much less uncounseled, inmates can meet. *See Lee v. State*, 44 So. 3d 1145, 1156 (Ala. Crim. App. 2009) (“A circuit court may summarily dismiss a postconviction petition, if, assuming every factual allegation in a . . . petition to be true, a court cannot determine whether the petitioner is entitled to relief. A court is not required to hold an evidentiary hearing but may consider all factual assertions raised in the petition to be true. If the court cannot determine whether the petitioner is entitled to relief after considering all of the factual assertions to be true, then the petitioner has failed to meet his burden of pleading” (citations omitted) (internal punctuation omitted)); *Abner v. State*, 41 So. 3d 828, 831 (Ala. Crim. App. 2008) (“An evidentiary hearing on a . . . petition is required only if the petition is ‘meritorious on its face.’ A petition is ‘meritorious on its face’ only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true.” (citations omitted)).

⁶⁵ *See, e.g., State v. Curtis*, 912 P.2d 1341, 1342 (Ariz. Ct. App. 1995) (“Defendants are precluded from seeking post-conviction relief on grounds that were adjudicated, or could have been raised and adjudicated, in a prior appeal or prior petition for post-conviction relief”); *People ex rel. McNair v. Bantum*, 507 N.Y.S.2d 275, 275 (N.Y. App. Div. 1986) (“[P]ostjudgment collateral relief [is not] available to review issues which could have and should have been raised on an earlier appeal.”); *State v. D'Ambrosio*, 652 N.E.2d 710, 713 (Ohio 1995) (explaining that a claim that was raised or could have been raised on direct appeal is not cognizable in postconviction proceedings).

⁶⁶ Hoffmann & King, *supra* note 18, at 842.

⁶⁷ *See* 28 U.S.C. § 2244(d) (2006).

⁶⁸ *See, e.g., id.* § 2254(b); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 80–91 (1977).

statutory limitation on relief⁶⁹—stand between the prisoner and merits review of his federal habeas claim. Yet, even in its current form,⁷⁰ federal habeas has something genuinely important to offer the non-capital state prisoner who manages to avoid or overcome the procedural traps: a new review of the issues by a life-tenured, Article III judge.

Unlike the state court judges before whom a federal habeas petitioner will have already lost, a federal judge's future on the bench does not depend upon the maintenance of good relations with local power brokers; this, of course, was the Framers' intention in providing for life tenure⁷¹ and the 39th Congress's point in passing the habeas corpus legislation of February 5, 1867.⁷² Even when job security is not at stake, it is always easier to see the mote in someone else's eye than the log in your own; consequently, to see an error in a state process or law is less emotionally taxing for a federal judge than for a state court judge.⁷³

⁶⁹ See 28 U.S.C. § 2254(d).

⁷⁰ As we discuss later, the efficacy of federal habeas as a remedy in individual cases and as a deterrent to future state court conduct could be significantly improved through one or more relatively minor modifications to existing law. See *infra* Part IV.

⁷¹ See THE FEDERALIST NO. 78 (Alexander Hamilton); see also, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 587–88 (2006) (discussing need for habeas corpus because military commission judges did not possess “the structural insulation . . . that characterizes the Court of Appeals for the Armed Forces”); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (explaining that the Good Behavior clause and the Compensation Clause “ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government”); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 969 (2007) (“Judges were to be independent of popular passions and certain kinds of pressures from other branches of the government. These were the purposes of the provisions for life tenure, the high standard for removal by impeachment, and the clause that salaries cannot be diminished while a judge is in office.”); Gregory S. Fisher, *Reining in Those Pesky Federal Judges*, FED. LAW., Jan. 2006, at 28, 29 (“The standard explanation for life tenure—derived from Federalist No. 78—is that Article III judges had to have a secure livelihood to ensure that they would be free from political, economic, or social pressures that might impermissibly influence their judgment. Life tenure resulted from the recognition that judges are corruptible, which is not to say that they are corrupt but to recognize that they are human.” (footnote omitted)).

⁷² *Fay v. Noia*, 372 U.S. 391, 416–17 (1963):

[A] remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged. . . . The elaborate provisions in the Act for taking testimony and trying the facts anew in habeas hearings lend support to this conclusion, as does the legislative history of House bill No. 605, which became, with slight changes, the Act of February 5, 1867. The bill was introduced in response to a resolution of the House on December 19, 1865, asking the Judiciary Committee to determine what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.

(footnote omitted) (internal punctuation omitted).

⁷³ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873–74 (2009) (arguing that lessons of institu-

Also, unlike their state court counterparts, federal judges are full-time students, administrators, and stewards of federal constitutional law. As such, they can be expected both to know more about the doctrines frequently implicated in federal habeas filings and to have a greater investment in maintaining the integrity and uniformity of those doctrines in the cases that come before them. Moreover, state court judges may face greater time constraints on their ability to research relevant constitutional principles than do federal judges because they are generally more overworked than federal judges and often have neither the quality nor quantity of law-clerk assistance that federal judges do. That these factors can make the difference between harmful constitutional error being recognized and remedied, and being overlooked or ignored, is proven every time a prisoner wins in federal court after having lost in state court.⁷⁴

Furthermore, noncapital federal habeas review does not always mean simple repetition of battles already lost in the state courts. Even under the current rules, which use a variety of procedural devices to prevent courts from reaching the merits, federal judges retain some power to make their review more robust than what the prisoner received from the state courts. For example, where it is not precluded by statute,⁷⁵ the federal court has discretion to hold an evidentiary hearing or expand the record to facilitate further development of the evidence supporting a prisoner's claims.⁷⁶ And "[w]henever . . . the interests of justice so require," the federal court may appoint counsel to assist a prisoner in litigating the case.⁷⁷ Additionally, as the Supreme Court recently reaffirmed, federal courts are under no obligation to accept at face value a state court's refusal to consider a particular claim on procedural grounds.⁷⁸ Thus, where a state court's application of a procedural bar proves unenforceable, federal habeas

tional design from administrative law teach the importance of separating persons who make investigative decisions from those who make adjudicative decisions).

⁷⁴ Of course, Hoffmann and King contend that these wins are too infrequent to be consequential. See Hoffmann & King, *supra* note 18, at 809–10. As we discuss later, however, the number of successful cases is not the only, nor the most important, metric for judging the worth of federal habeas review. And, to the extent the numbers are important, we also suspect that Hoffmann and King's figures understate the ranks of noncapital state prisoners who succeed in federal habeas. See *infra* Part II.B.

⁷⁵ See 28 U.S.C. § 2254(e)(2) (2006) (barring federal evidentiary hearing if prisoner "failed to develop the factual basis of a claim in State court proceedings"); *Williams v. Taylor*, 529 U.S. 420 (2000).

⁷⁶ See RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 7 (2004); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (noting that the "basic rule" vesting district courts with discretion to grant evidentiary hearings has not changed).

⁷⁷ See 18 U.S.C. § 3006A (2006) (authorizing appointment of counsel in the interest of justice).

⁷⁸ See *Cone v. Bell*, 129 S. Ct. 1769, 1782 (2009) (noting federal habeas courts' "independent duty to scrutinize the application of state rules that bar . . . review of federal claims").

provides the first and only opportunity for merits review of the prisoner's claim.⁷⁹

2. *The Persistence of Racial Discrimination*

Not surprisingly, Hoffmann and King do not dismiss the importance of noncapital habeas in the struggle for racial equality. Instead, they seem to assume that struggle is over—or at least that it no longer presents issues that federal habeas can remedy. This assumption, like their reliance on state court postconviction, seems unduly sanguine.

It is true that the violent expression of racial animosity prevalent during the 1950s and '60s as well as the more egregious forms of racial discrimination in the criminal justice system have largely disappeared. But psychologists confirm that other forms of racial prejudice are still common and often more difficult to detect, in part because of the social stigma now attached to racism and in part because racial stereotypes and associations often operate on a subconscious level.⁸⁰ And as Clarence Moore's story reflects, those subtler forms of racial discrimination continue to infect the criminal justice system. State courts (and even some federal courts) have not been particularly vigilant about rooting out these forms of racial discrimination, whether they stem from racially inflammatory prosecutorial argument,⁸¹ juror bias,⁸² or even the racism of defense attorneys.⁸³ Moreover, if the ulti-

⁷⁹ This occurrence is not uncommon. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 387–88 (2002) (rejecting procedural bar and remanding the due process claim on the merits to the court below); *Ake v. Oklahoma*, 470 U.S. 68, 75–83 (1985) (rejecting the state court's procedural default holding and finding that an indigent, death-sentenced inmate has a due process right to the "basic tools" of an adequate defense); *see also Kindler v. Horn*, 542 F.3d 70, 72, 78–80 (3d Cir. 2008) (rejecting state court's application of procedural bar and granting relief on petitioner's ineffective assistance of counsel claim); *Bell v. Miller*, 500 F.3d 149, 153–157 (2d Cir. 2007) (similar); *Haliym v. Mitchell*, 492 F.3d 680, 691–92, 718–20 (6th Cir. 2007) (similar); *Smith v. Mullin*, 379 F.3d 919, 926–27, 944 (10th Cir. 2004) (similar).

⁸⁰ *See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004) (documenting the presence of automatic bias among defense lawyers); *Sheri Lynn Johnson, Litigating for Racial Fairness after McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 189–201 (2007) (summarizing literature on modern racial bias relevant to criminal cases); *Jerry Kang, Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506–35 (2005) (reviewing the literature on subconscious bias).

⁸¹ *See, e.g., State v. Bennett*, 632 S.E.2d 281, 285 (S.C. 2006) (noting that the prosecutor referred to an African-American defendant as "King Kong" during penalty phase summation).

⁸² *See, e.g., Rouse v. Lee*, 314 F.3d 698, 700–01 (4th Cir. 2003) (describing unsuccessful state court challenge based on juror's posttrial admissions of racial bias and intentional concealment designed to secure a seat on the capital defendant's jury), *vacated*, 339 F.3d 238 (4th Cir. 2003).

⁸³ *See, e.g., Osborne v. Terry*, 466 F.3d 1298, 1316–17 (11th Cir. 2006) (describing the state court's denial of relief on petitioner's ineffective assistance of counsel claim where appointed defense counsel reportedly remarked about his client that "[t]he little nigger deserves the death penalty"); *Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994) (noting that appointed counsel called a defendant "stupid nigger son of a bitch" and

mate remedy for subtle racism in the jury box is to change the composition of juries, it is worth noting that some states have recalcitrantly resisted enforcing *Batson v. Kentucky*'s⁸⁴ prohibition against discrimination in the exercise of the peremptory challenge.⁸⁵

More generally, even if racial discrimination were totally eliminated—something far in the future, in our estimation—we find it at least unwise to predicate judgments about the importance (or unimportance) of habeas on its prevalence. Habeas in Civil War times was not primarily beneficial for those facing racial discrimination; rather, it was those facing procedural issues raised by Reconstruction who most wanted habeas review. Today, few would dispute the importance of the issues raised by the Guantanamo Bay detainees, but even fewer would have anticipated such issues. Times change, as does the nature of governmental infringements on individual rights. If we can expect that new issues occasionally will generate new need for habeas review, limiting habeas now because one form of governmental abuse is on the wane seems foolish indeed. Hoffmann and King think that habeas exists for unforeseen crises, and that once the specific crisis is gone, habeas is unnecessary.⁸⁶ The problem, of course, is that noncapital habeas jurisdiction, once killed, is unlikely to be resurrected in the next time of crisis.

B. The Claim That Federal Habeas Is Not Worthwhile Because Too Few Prisoners Win

The second plank in Hoffmann and King's antihabeas platform is that collateral challenges to noncapital convictions succeed so infrequently that maintaining the availability of habeas review for such cases is pointless.⁸⁷ We are not convinced by the empirical evidence they present in support of this assertion. Nor do we believe the answer to low success rates—even if they are as low as Hoffmann and King suggest—is simply to scrap the system, both because systemic improvements are genuinely possible (as we discuss in Part IV) and because, even in its current form, noncapital habeas review serves an important purpose.

Hoffmann and King claim that noncapital habeas petitioners succeed at the unacceptably low rate of 0.34%.⁸⁸ But the 2007 study on which they rely was too narrow in scope to provide reliable support for

threatened to provide substandard performance if defendant chose to exercise right to trial).

⁸⁴ 476 U.S. 79 (1986).

⁸⁵ Sheri Lynn Johnson, *Race and Recalcitrance: The Miller-El Remands*, 5 OHIO ST. J. CRIM. L. 131, 131 (2007); see *Miller-El v. Dretke*, 545 U.S. 231, 236–37 (2005).

⁸⁶ Hoffmann & King, *supra* note 18, at 804–05.

⁸⁷ *Id.* at 806–07.

⁸⁸ *Id.* at 809.

this claim. By its own tally, the study examined only 6.5% of the habeas cases filed in federal district courts over a two-year period.⁸⁹ More importantly, the study neither tracked the cases through the courts of appeals nor determined the number of court of appeals decisions reversing district courts' denials of relief.⁹⁰ By contrast, our ongoing monitoring of court of appeals dispositions (done for the purpose of tracking and reporting on case law developments) shows that of 917 decisions issued between July 1, 2005 and September 30, 2009 in which a court of appeals' final merits ruling followed a district court decision, 126 arrived at the appellate court having been successful below (i.e., the petitioner was meritorious), and 154 left the appellate court with relief having been granted.⁹¹ Thus, according to our data, the set of successful noncapital cases grows by 22% when appellate outcomes are considered. Moreover, petitioners' success rates vary enormously by circuit, and Hoffmann and King's complete failure to report this fact or discuss how to interpret that variation greatly undercuts any conclusions that can be drawn from the conglomerate success rate.⁹²

Moreover, the capacity of federal habeas corpus to influence grants of relief is not limited to the four walls of the federal courthouse. Hoffmann and King believe state appellate and postconviction courts have proven themselves capable of serving as the primary adjudicators of federal constitutional claims.⁹³ But to the extent those courts have exhibited the ability and willingness to grant relief in deserving cases, they have done so with knowledge that a federal habeas court with the power to overturn their judgments would be examining

⁸⁹ KING ET AL., *supra* note 19, at 15.

⁹⁰ See Hoffmann & King, *supra* note 18, at 811 n.70 ("The study examined only decisions of the district courts; we do not know whether any of the decisions to deny relief were reversed on appeal.").

⁹¹ In all, 1,547 noncapital court of appeals decisions in § 2254 cases were reviewed. Of these, 630 dispositions on grounds other than an outright merits decision (e.g., denials of a certificate of appealability, dismissals for untimeliness, or remands following grants or denials of relief) were set aside. The resulting set of 917 decisions involved cases in which a district court had either granted or denied relief on the merits, and the court of appeals either affirmed or reversed the district court's judgment on the merits without remanding the case for further proceedings (e.g., an evidentiary hearing, consideration of a procedural default issue, or consideration of a timeliness issue). Of the 126 district court grants of relief that were appealed, 60 were affirmed and 66 were reversed; of the 791 district court denials of relief, 697 were affirmed and 94 were reversed.

⁹² Our appellate outcomes data also show substantial variation among circuits. For example, while noncapital habeas petitioners won on the merits in the Fifth and Sixth Circuits at rates of 21.73% (10 of 46 cases) and 22.85% (40 of 135 cases), respectively, the success rate in the Eleventh Circuit was a mere 1.66% (1 out of 60 cases). This data suggests that conservative courts like the Eleventh Circuit artificially depress the overall success rate; the problem might not lie so much with the noncapital habeas but with the composition of some of the courts charged with its enforcement.

⁹³ See Hoffmann & King, *supra* note 18, at 834–42.

denials of relief. If the prospect of subsequent federal habeas review was eliminated, there is every reason to believe that relief rates in state courts would decrease, not because of a reduction in the number of deserving cases, but because a key incentive for state courts to acknowledge and remedy constitutional error would be absent. Put differently, Hoffmann and King completely ignore the vast literature on deterrence.⁹⁴ It *may* be that all or most state courts will happily continue to enforce the Constitution even with no possibility of correction or sanction, but there is really no reason to think that will be the case.

Even if success rates in noncapital federal habeas cases are legitimately too low—and as discussed above, we believe they vary greatly and, in the aggregate, are higher than Hoffmann and King report—the appropriate response is to ask why this is so, not to reflexively scuttle the whole system. Hoffmann and King do not suggest that low success rates under the current system reflect a lack of meritorious claims brought by noncapital prisoners.⁹⁵ On the contrary, they recognize—albeit briefly—the widely held belief that many meritorious habeas claims are never adjudicated because of the dizzying array of procedural traps that noncapital prisoners, who overwhelmingly proceed *pro se*, must struggle to avoid simply to obtain merits review.⁹⁶ They also admit—again briefly—that “one way to respond to” this state of affairs would be to lower the procedural hurdles and provide for wider availability of appointed counsel in noncapital cases.⁹⁷ As quickly as Hoffmann and King acknowledge these ideas, however, they dismiss them out of hand as too expensive and as “political non-starter[s]” absent “some kind of corresponding tradeoff for the states.”⁹⁸ As we discuss in Part IV, Hoffmann and King’s explanation for these quick dismissals is inadequate.

Whatever the merits of Hoffmann and King’s arguments about deterrent effects and statistical likelihoods of success at the macro level, it must be remembered (with apologies to Judge Henry Friendly⁹⁹) that the Great Writ of habeas corpus has been recognized

⁹⁴ See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

⁹⁵ See Hoffmann & King, *supra* note 18, at 810, 812–13 (“The study cannot tell us, of course, whether the incredibly low rate of habeas grants reflects a comparably low frequency of meritorious claims, or whether there are many more habeas petitioners who deserve relief but do not obtain it.”).

⁹⁶ See *id.* at 812–13.

⁹⁷ See *id.*

⁹⁸ *Id.* at 813.

⁹⁹ See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (observing that “[a]ny murmur of dissatisfaction with” a criminal conviction, marking only “the end of the beginning” of litigation in the prisoner’s case, “provokes immediate incantation of the Great Writ, with the inevitable initial capitals,

since the founding both as “a vital instrument for the protection of *individual* liberty” and as a powerful symbol of the nation’s intolerance of arbitrary imprisonment.¹⁰⁰ Although an array of judicially and legislatively created devices that give primacy to states’ interests in finality has lessened its force, the writ’s remaining capacity to impact individual cases—and to profoundly alter the course of real lives such as Clarence Moore’s—must not be discounted.

A little digging revealed a variety of compelling noncapital cases in which constitutional rights were violated but state courts declined to remedy those violations. For example, Michael Wolfe was convicted of the murder of a romantic rival and sentenced to life imprisonment in 1995. The trial judge, who had previously represented the victim, denied motions for a change of venue and seated four jurors who expressed doubts that they could be fair—two of whom admitted to “close and longstanding relationships” with the victim’s parents.¹⁰¹ The state court rejected Wolfe’s Sixth Amendment claim, but the Sixth Circuit reasoned on federal habeas review that “[i]n the absence of an affirmative and believable statement that these jurors could set aside their opinions and decide the case on the evidence and in accordance with the law, the failure to dismiss them was unreasonable.”¹⁰² After the Sixth Circuit affirmed the grant of habeas relief and vacated his sentence, Wolfe pled guilty to voluntary manslaughter and received a sentence of twelve years of imprisonment, which he has now served.

We pause for just one more story. Johnnie Brown was convicted and sentenced to *thirty years imprisonment* for stealing fifty cents and an adult-bookstore token.¹⁰³ Brown was homeless when the theft took place, and in his statement to the police, he explained that he believed the victim was following him and was about to attack.¹⁰⁴ After a half-hour bench trial, Brown was convicted and sentenced to the maximum possible term.¹⁰⁵ He remained incarcerated for eleven years until the Seventh Circuit ordered the vacation of Brown’s conviction based on trial counsel’s “failure to investigate adequately and discover Brown’s documented history of schizophrenia and treatment.”¹⁰⁶ That court—not known for any prodefendant sympathies—observed

often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant”).

¹⁰⁰ *Boumediene v. Bush*, 553 U.S. 723, 743 (emphasis added); see also *id.* at 743–44 (discussing the Founders’ view of the writ of habeas corpus).

¹⁰¹ *Wolfe v. Brigano*, 232 F.3d 499, 501, 503 (6th Cir. 2000).

¹⁰² *Id.* at 503.

¹⁰³ See *Brown v. Sternes*, 304 F.3d 677, 680–81 (7th Cir. 2002).

¹⁰⁴ *Id.* at 681–82.

¹⁰⁵ *Id.* at 685–86.

¹⁰⁶ *Id.* at 695–96.

that Brown's case was "a striking example of a legal system that processed [a] defendant as a number rather than as a human being" and that it "signal[ed] a breakdown" in the system.¹⁰⁷

We discuss below the limited noncapital habeas review that Hoffmann and King would retain to show that their narrow exceptions fail to capture many instances of injustice; none of those exceptions would grant review to the next Moore, the next Wolfe, or the next Brown. Absent a meaningful substitute—which, as we discuss in Part IV, Hoffmann and King's proposal would not deliver—turning our backs on these prisoners and others like them would be unconscionable. It would also, on a symbolic level, represent an alarming erosion of the nation's commitment to individual liberty.

C. The Claim That Federal Habeas Costs Too Much

Hoffmann and King's final rationale for shutting down noncapital habeas review is that it costs the parties and the courts too much money and that this money would be better spent on the alternative they propose.¹⁰⁸ We do not contest the proposition that the noncapital habeas system costs money to operate. We do, however, find it difficult to give meaningful weight to Hoffmann and King's cost-based arguments because they have provided no actual dollar figures with which to gauge them.¹⁰⁹ Hoffmann and King do not tell us how much money courts or parties spend per case. Even more importantly, they do not address how much would be saved by paring back noncapital habeas to only those cases meeting their proposed statutory gateway to

¹⁰⁷ *Id.* at 698–99.

¹⁰⁸ See Hoffmann & King, *supra* note 18, at 816 ("States can count on winning almost every one of these cases, but they can also count on a significant expenditure of state dollars to defend them. Any system of justice that expends so much effort and produces so little benefit deserves reconsideration." (footnote omitted)); *id.* at 823–24 ("Whatever can be saved by cutting back on habeas review—and additional funds—should be devoted to a new federal initiative aimed at helping the states prevent and correct constitutional violations in their own courts.").

¹⁰⁹ The closest Hoffmann and King come to filling in this blank is to note that "with more than 18,000 habeas petitions filed each year, the cost for the states adds up," Hoffmann & King, *supra* note 18, at 816, and that the Philadelphia District Attorney's Office claimed at a congressional hearing to have increased its staff of habeas lawyers by "400%" in the decade between 1995 and 2005, *id.* at 816 n.93. Rather than simply concluding, as Hoffmann and King do, that these numbers reflect a habeas system overrun with petitioners, one might instead view them as a natural consequence of our world-leading incarceration rate. See ROY WALMSLEY, WORLD PRISON POPULATION LIST 1 (8th ed. 2009) ("The United States has the highest prison population rate in the world, 756 per 100,000 of the national population . . ."), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf; HEATHER C. WEST & WILLIAM J. SABOL, PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES 2 tbl.1 (2009) (showing that as of June 30, 2008, 1,610,584 citizens were incarcerated in state and federal prisons in the United States). Indeed, if Hoffmann and King's estimate of 18,000 habeas petitions per year is correct, then only approximately 1 out of every 90 prisoners seeks habeas relief in a given year; the numbers could be far worse.

review. Perhaps reliable numbers simply do not exist. But if that is the case, it certainly does nothing to reinforce Hoffmann and King's claim that the numbers—whatever they are—necessitate radical change. Moreover, for reasons we discuss below, whatever the cost of noncapital habeas, we very much doubt that anything short of its total elimination will actually save significant amounts of money. Finally, as we also discuss below, whatever the actual dollar savings might be, Hoffmann and King's proposal for how to redirect it is seriously flawed.

III.

HOFFMANN AND KING'S PROPOSALS FOR REPLACING THE CURRENT HABEAS SCHEME

Having made their economic argument against retention of the existing habeas scheme, Hoffmann and King propose to replace that system with the combination of a pared-down habeas statute and a new federal agency tasked with supplying defense-services assistance to states willing to accept it.¹¹⁰ We are not persuaded.

A. The Proposed Statutory Amendment

The first phase of Hoffmann and King's overhaul would be to immediately amend the habeas statute to prohibit issuance of the writ for any person in custody pursuant to the judgment of a state court unless

- (1) the petitioner is in custody in violation of the Constitution or laws or treaties of the United States and has established by clear and convincing new evidence, not previously discoverable through the exercise of due diligence, that no reasonable factfinder would have found him guilty of the underlying offense in light of the evidence as a whole;
- (2) the petitioner is in custody in violation of a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court; or
- (3) the petitioner is under a sentence of death, and either (a) his death sentence was imposed in violation of the Constitution or laws or treaties of the United States or (b) he is legally ineligible to be executed.¹¹¹

According to Hoffmann and King, these changes would have the desirable effect of "dramatically reduc[ing] the amount of noncapital habeas litigation by state prisoners," nearly all of whom would be lim-

¹¹⁰ See Hoffmann & King, *supra* note 18, at 818–34 (laying out the two prongs of the authors' replacement habeas scheme).

¹¹¹ *Id.* at 819.

ited to remedies available through state court review.¹¹² They further assume that, should these state court remedies become less available or meaningful in the wake of the reduction of federal habeas review, the Suspension Clause would mandate ad hoc restoration of that review to fill the resulting gap.¹¹³ In our view, these assumptions are far too optimistic with regard to the proposed scheme's ability to identify and provide a remedy in truly deserving cases or to bring about substantial net reductions in federal litigation.

Despite their manifestly low regard for noncapital habeas review, Hoffmann and King do not advocate its wholesale elimination but instead suggest the pair of jurisdictional filters contained in subdivisions (1) and (2) of their proposed statute.¹¹⁴ Presumably, those two narrow openings reflect a concession by Hoffmann and King that truly deserving cases do, at least on rare occasions, slip through the state court cracks and that the unfortunate prisoners in those cases should not be left with nowhere else to go.¹¹⁵ If the reader perceives such a concession, he or she is left to wonder why Hoffmann and King selected the particular statutory exceptions they propose.¹¹⁶

As it has been applied through 28 U.S.C. § 2244(b), the substance of the proposed subdivision (1) exception is an inadequate means of facilitating review of possible innocence cases. This result is due in substantial part to its requirement of proof that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."¹¹⁷ Evidence of innocence is

¹¹² *Id.* at 822–23.

¹¹³ *See id.* at 837–39.

¹¹⁴ *See id.* at 819.

¹¹⁵ *See id.* at 820 ("Since cases of wrongful conviction involve the most fundamental kind of unjust incarceration, they justify the extraordinary expenditure of resources to allow habeas courts to provide a last-chance remedy.").

¹¹⁶ The answer may be simply that these exceptions were available off the shelf. After all, Hoffmann and King's proposed subdivisions (1) and (2) are nearly identical to 28 U.S.C. § 2244(b)(2)(A)–(B), which set the conditions a prisoner must meet when seeking permission to file a "second or successive" petition under the current scheme. *See* 28 U.S.C. § 2244(b)(2)(A) (2006) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . ."); *id.* § 2244(b)(2)(B) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.").

¹¹⁷ *Id.* § 2244(b)(2)(B)(i). For all its capacity to block review in an otherwise deserving case, § 2244(b)(2)(B)(i)'s requirement that evidence be new to warrant authorization to proceed with a second or successive petition does provide a strong incentive (necessary or not) for full investigation and presentation of claims in a first petition. That theoretical

not always found as quickly as it should be or as quickly as a court applying the statutory exception *believes* it should be.¹¹⁸ When delay occurs, it is often attributable to counsel, not the prisoner.¹¹⁹ But this difference does prisoners no good because they must bear the consequences of counsel's errors as if the errors were their own¹²⁰ and be-

justification for requiring newly discovered evidence is absent from the context proposed by Hoffmann and King, as prisoners would be required under their regime to present new, previously undiscoverable evidence merely to be heard a *first* time.

¹¹⁸ Even an innocence claim can, under current law, be lost if not asserted soon enough. *See, e.g., In re Davis*, 565 F.3d 810, 824–25 (11th Cir. 2009) (per curiam) (rejecting petitioner's actual-innocence claim), *vacated*, 130 S. Ct. 1 (2009) (granting a stay of execution and remanding for an evidentiary hearing); *Johnson v. Dretke*, 442 F.3d 901, 911 (5th Cir. 2006) (affirming dismissal of a previously authorized second § 2254 petition because “[i]n light of the plain text of AEDPA and [Fifth Circuit] case law, we must conclude that a successive petitioner urging a *Brady* claim may not rely solely upon the ultimate merits of the *Brady* claim in order to demonstrate due diligence under § 2244(b)(2)(B) where the petitioner was noticed pretrial of the existence of the factual predicate and of the factual predicate's ultimate potential exculpatory relevance.”), *cert. denied sub nom. Johnson v. Quarterman*, 549 U.S. 956 (2006).

¹¹⁹ *See, e.g., In re Coleman*, 344 F. App'x 913, 916 (5th Cir. 2009) (denying an application for leave to file second or successive habeas petition for failure to satisfy § 2244(b)(2)(B)'s “diligence” requirement because “[t]he factual predicate to the instant claim could have been discovered through the exercise of due diligence prior to the denial of Coleman's original [counseled] habeas petition in September 2004 and certainly prior to the filing of the instant motion”); *see also In re Nealy*, 223 F. App'x 358, 365–66 (5th Cir. 2007); *Bonds v. Superintendent*, 620 F. Supp. 2d 945, 947 (N.D. Ind. 2009) (rejecting petitioner's contention that evidence supporting his habeas challenge to murder and conspiracy convictions was not previously discoverable for purposes of calculating limitations period under § 2244(d)(1)(D) because “post-conviction counsel had her predecessor's work product file and also discussed the case with him” and “[n]othing in the record suggests why, with due diligence, she could not have found the search warrant and affidavit”); *Frazier v. Farmon*, No. 97-2196, 2007 WL 2019549, at *17 (E.D. Cal. July 9, 2007) (rejecting petitioner's argument that several claims for federal habeas relief were timely under § 2244(d)(1)(D) because, “even if the factual predicates for any of the new claims had been unknown to petitioner Frazier, the factual predicates should have been known by her [state] habeas counsel on or before December 31, 1999, thereby triggering the running of the one-year period of limitation”).

¹²⁰ *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (“There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” (citing *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987))); *see also, e.g., Maples v. Allen*, 586 F.3d 879, 891 (11th Cir. 2009) (expressing that counsel's failure to timely file notice of appeal from denial of state postconviction relief did not constitute “cause” to overcome resulting procedural default); *Ruiz v. Quarterman*, 460 F.3d 638, 644 (5th Cir. 2006) (“[T]he law of this Court is clear: ineffective state habeas counsel does not excuse failure to raise claims in state habeas proceedings. Where the state has provided a habeas remedy, the petitioner must pursue it before filing in federal court, even if the state provides ineffective habeas counsel.” (footnote omitted)); *Johnson v. McBride*, 381 F.3d 587, 589–90 (7th Cir. 2004) (affirming dismissal of an untimely federal habeas petition in capital case where “[n]o one interfered with Johnson's ability to pursue collateral relief in a timely fashion. He wants us to treat his own lawyer as the source of interference, but lawyers are agents. Their acts (good and bad alike) are attributed to the clients they represent. . . . So it is as if Johnson himself had made the decisions that led to the delay”); *Frye v. Hickman*, 273 F.3d 1144, 1145 (9th Cir. 2001) (“[T]he miscalculation of the limitations period by Frye's counsel and his negligence in general do

cause challenges to postconviction or federal habeas counsel's effectiveness are not cognizable in federal habeas corpus.¹²¹ Of course, the failure of a prisoner's proof of innocence to conform to procedural requirements concerning the timing or circumstances of its discovery does nothing to change the fact that, at the end of the day, an innocent person has been put behind bars (or worse).

Equally troubling, subdivision (1) would bar the federal courthouse doors to a range of wrongfully convicted prisoners whose challenges take the form of claims that their convictions are unreliable but do not include an affirmative showing of innocence.¹²² As the Clarence Moore case with which we began illustrates, innocent defendants do not always have freestanding innocence claims, either because evidence of their innocence may have been "lost," as it was in Moore's case, or because it was never uncovered at all. Often, it is the remedy for procedural error that provides an opportunity for a *fair* assessment of the defendant's guilt and concludes in an acquittal or even in the prosecutor's decision not to reprosecute. Given Hoffmann and King's determination that present-day habeas has become too procedurally cumbersome to merit retention, we would have thought the narrow exceptions they chose to recognize might have been better calibrated to encompass worthy claimants—even if they assess worthiness purely in terms of likely factual innocence.¹²³

As ineffectual as Hoffmann and King's subdivision (1) would be as a safety valve for many deserving noncapital prisoners, subdivision (2) seems even less well conceived. As they acknowledge,¹²⁴ since the

not constitute extraordinary circumstances sufficient to warrant equitable tolling."); Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir. 1997) (en banc) ("Because Mackall has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective. Consequently, federal habeas review of those claims is barred.").

¹²¹ See 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

¹²² See Hoffmann & King, *supra* note 18, at 823 n.113 (acknowledging that "even prisoners ultimately exonerated rarely raise[] claims of innocence in habeas" (citing Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 128 (2008))).

¹²³ Hoffmann and King exhibit particular hostility toward "federal habeas review of Sixth Amendment claims of ineffective assistance of counsel," which they assert—without citation to a shred of support—"currently squanders resources while failing to remedy defense-attorney deficiencies." Hoffmann & King, *supra* note 18, at 823; see also *id.* at 826 ("[C]ase-by-case litigation under *Strickland v. Washington* has failed, and will continue to fail, as a means of ensuring the right to counsel in noncapital cases." (footnote omitted)). But whether such cases improve the quality of representation, they often provide a new trial—and the chance of an acquittal—to those who are or may be factually innocent.

¹²⁴ See *id.* at 823 n.113 ("Regarding our second exception, the Supreme Court has never held retroactive any rule affecting noncapital petitioners, other than the rule in *Gideon*.").

Supreme Court adopted its nonretroactivity rule in 1989,¹²⁵ it has *never* found a “new rule” eligible for application to noncapital judgments already final at the time the rule was announced.¹²⁶ The Court has also candidly admitted it has no expectation of breaking this streak any time soon.¹²⁷ We are at a loss as to why Hoffmann and King would propose, as one of only two narrow bases for noncapital habeas jurisdiction, an exception that has been a dead letter since its inception in *Teague v. Lane* and is destined to remain so for the foreseeable future.

Even if we were to accept Hoffmann and King’s view that noncapital habeas has become outmoded and should be stripped back to the exceptions they propose, we still could not agree with their prediction that, if such sweeping revisions were made, the flow of noncapital habeas litigation would be “dramatically reduce[d].”¹²⁸ It would certainly change, and it would likely be reduced to some degree—but that extent is far from clear. Hoffmann and King recognize that “[m]any convicted defendants will make claims of factual innocence [under subdivision (1)] because for most it will be the only possible avenue to obtain habeas relief”; but they go on to speculate that “[m]ost such claims . . . should be resolved relatively quickly” on the ground that they lack facial plausibility.¹²⁹ We doubt that. Although truly meritorious claims of actual innocence are difficult to make, facially plausible ones are not. Such claims are ordinarily fact intensive and, once made, tend at a minimum to require a diligent federal court to perform a careful examination of the state court record. This review takes time and resources, especially if it is to be done (as Hoffmann and King seem to envision) without burdening the state’s counsel—whose knowledge of a given case is usually greater than that of a federal judge or law clerk—with the task of preparing and filing a response to the petition. And where the state’s counsel is required to respond, either to assist the court in determining the facial plausibility of a claim or to rebut a claim whose plausibility has already been determined, the resource savings Hoffmann and King tout will be further eroded. Moreover, as we discuss below, the resources consumed in Suspension Clause litigation would dwarf those spent processing claims under the actual-innocence exception

¹²⁵ See *Teague v. Lane*, 489 U.S. 288, 305–11 (1989).

¹²⁶ This result is not attributable to lack of opportunities. Since *Teague*, the Court has considered and rejected arguments for retroactive application of new decisions on numerous occasions. See, e.g., *Whorton v. Bockting*, 549 U.S. 406, 416–21 (2007); *Schriro v. Summerlin*, 542 U.S. 348, 351–58 (2004); *O’Dell v. Netherland*, 521 U.S. 151, 167 (1997); *Lambrix v. Singletary*, 520 U.S. 518, 539–40 (1997).

¹²⁷ *Tyler v. Cain*, 533 U.S. 656, 666 n.7 (2001) (“[I]t is unlikely that any of these watershed rules ‘has yet to emerge.’” (citation omitted)).

¹²⁸ Hoffmann & King, *supra* note 18, at 822.

¹²⁹ *Id.* at 820 n.98.

We pause here to briefly comment on the third exception to the abolition of habeas review: prisoners under death sentence. It might seem surprising that the three of us—all capital-defense lawyers—would protest this exception. And assuming the rest of the Hoffmann and King proposal were adopted, we certainly would lobby to keep the capital-defendant exception. But we have to note that the Hoffmann and King rationales for treating capital cases differently, when examined, do not support the drastic curtailment of noncapital habeas they propose. Instead, they support equipping the noncapital petitioner with the same tools that the capital petitioner now possesses.

Hoffmann and King observe that although “federal habeas review is generally ineffectual to correct constitutional violations in state court, capital cases would seem to be the exception that proves the rule, as habeas grant rates are far higher in capital than in noncapital cases.”¹³⁰ It is important, however, to consider *why* the rates of success are greater in capital cases before deciding whether to abolish noncapital habeas. Hoffmann and King fail to acknowledge a key distinction between capital and noncapital habeas petitioners: the former enjoy a statutory right to the assistance of appointed counsel¹³¹ while the latter do not. If noncapital habeas petitioners had access to counsel like their death-sentenced counterparts already do, their success rates would undoubtedly be higher,¹³² though perhaps not as high as the rates in capital cases.¹³³ As we discuss in Part IV, correcting this disparity is one of the changes that serious reform of habeas corpus should undertake.

Hoffmann and King also argue that the complexities of death-penalty law warrant an exception for capital habeas. But in fact, most successful capital habeas petitioners do not win on Eighth Amendment issues, complex or otherwise; they win on standard criminal-procedure issues—the same types of issues that arise in noncapital cases. Were noncapital petitioners entitled to appointed counsel, many more of them would win on those standard criminal-procedure issues.¹³⁴

Of course, death is different, and because the stakes are higher in capital cases than noncapital cases, greater costs might be tolerated.

¹³⁰ *Id.* at 822.

¹³¹ See 18 U.S.C. § 3599 (2006).

¹³² Cf. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 771 (1988) (demonstrating that prisoners with counsel succeed at nearly the same rate as nonprisoners with counsel in constitutional tort litigation).

¹³³ That the stakes are higher in capital cases may make defense lawyers more zealous and judges more careful, even if the same quality of counsel were appointed.

¹³⁴ Cf. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 496 (1996) (arguing that the greater attention and quality of representation in capital cases leads to a greater likelihood of exoneration).

But even if stakes matter, we think death is too high a threshold. Surely a life-without-parole sentence matters enough to at least *consider* whether it should be eligible for habeas relief.¹³⁵

B. The Role of the Suspension Clause

Hoffmann and King state that “[t]he viability of [their] proposal to largely dismantle federal habeas review in noncapital cases . . . depends on the assumption that the states will continue to provide a reasonable level of posttrial or postplea judicial review of claims of constitutional error in those cases.”¹³⁶ One obvious method of ensuring the availability of such review in state courts would be to establish it as a quid pro quo for the elimination of federal review. Hoffmann and King, however, oppose the quid pro quo method as anything but a last resort.¹³⁷ Instead, encouraged by the decision in *Boumediene v. Bush*,¹³⁸ they believe that, “[s]hould the states fail to maintain robust postconviction review,” the Supreme Court would apply “the Suspension Clause [to] prohibit [the] proposed cutback of federal habeas.”¹³⁹

Although we regard Hoffmann and King’s outlook for the Roberts Court and the Suspension Clause¹⁴⁰ as unduly optimistic, we accept it for purposes of this discussion. As they see it, severely limiting federal review in their proposed manner would give rise to Suspension Clause challenges,¹⁴¹ which could be defeated “only if an ‘adequate substitute’ [for habeas federal review were] available.”¹⁴² As

¹³⁵ Cf. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that the Eighth Amendment prohibits imposition of a sentence of life without parole on a juvenile who did not commit homicide).

¹³⁶ Hoffmann & King, *supra* note 18, at 836–37.

¹³⁷ *Id.* at 847 (calling for quid pro quo arrangement only “[i]f the [Supreme] Court were to construe narrowly its constitutional authority to oversee restrictions on the writ”). We explain our disagreement with this portion of Hoffmann and King’s proposal in Part IV, *infra*.

¹³⁸ 553 U.S. 723 (2008).

¹³⁹ Hoffmann & King, *supra* note 18, at 837; see also *id.* at 839 (“Based on [*Boumediene* and cases cited therein], we believe that when squarely presented with this issue, the Court will acknowledge that the Suspension Clause provides at least some level of constitutional protection for federal judicial review of the constitutional rights of persons serving state sentences.”).

Hoffmann and King also say their “assumption” that states will maintain “reasonable” review systems is “warranted for reasons both legal and practical.” *Id.* at 836–37. Other than noting that states enjoy some freedom to shape their own review procedures and that they may value flexibility, efficiency, and responsiveness to local concerns, Hoffmann and King do not tell us what these “reasons” are. See *id.* at 837 n.164.

¹⁴⁰ U.S. CONST. art. I, § 9, cl. 2.

¹⁴¹ See Hoffmann & King, *supra* note 18, at 840–41 (“For most state prisoners, the likelihood of meaningful review of constitutional claims through these channels would be minute, and future habeas petitioners would surely challenge our proposal as a violation of the Suspension Clause.”).

¹⁴² *Id.* at 839 (citing *Boumediene v. Bush*, 553 U.S. 723, 733 (2008)).

they read *Boumediene*, such a substitute “must provide the prisoner with, at a minimum, ‘a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law.’”¹⁴³ Relying on their belief that “every state” presently provides such a meaningful opportunity—for both claims based on the trial record and claims built on evidence developed outside that record—Hoffmann and King regard their proposal as a safe bet.¹⁴⁴ “[A]s long as a particular state does not respond to our proposed cutback . . . by abdicating its own commitment to vindicate federal rights in state court,” they declare, “our proposal will pass muster under *Boumediene* and the Suspension Clause.”¹⁴⁵ And while they anticipate an initial wave of challenges in the federal district courts, they assert that “[t]his burden . . . should diminish quickly as the Supreme Court decides whether the review processes in various states are such that the proposed new habeas restrictions comply with the Suspension Clause.”¹⁴⁶

We have no confidence that the Suspension Clause issues Hoffmann and King frame would be resolved as quickly, cleanly, or finally as they envision. To begin with, while Hoffmann and King seem to anticipate that a decision rejecting a Suspension Clause challenge in one prisoner’s case would largely, if not entirely,¹⁴⁷ foreclose future challenges by other prisoners in the same state,¹⁴⁸ there is no reason to believe this would be so. On the contrary, the statutes at issue in the “two leading cases addressing habeas substitutes”¹⁴⁹—28 U.S.C. § 2255 in *United States v. Hayman*¹⁵⁰ and D.C. Code § 23-110(g) in

¹⁴³ *Id.* (citing *Boumediene*, 553 U.S. at 779).

¹⁴⁴ *Id.* at 842.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 846. Remarkably, Hoffmann and King support this assertion by adding, “After all, the Court expeditiously resolved the most fundamental constitutional challenges to AEDPA, allowing the lower federal courts to dispose of such claims summarily.” *Id.* Hoffmann and King cite no evidence of this nimble response by the Supreme Court, and none is apparent to us. Moreover, having been involved to varying degrees in the litigation of many of the Supreme Court’s AEDPA cases for fourteen years and counting, “expeditiously” would be among the last terms we would choose to characterize the Court’s performance in resolving the myriad issues to which that statutory scheme has given rise. *See, e.g.,* *Wood v. Allen*, 130 S. Ct. 841, 849 (2010) (“[W]e have explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2).”); *McLuckie v. Abbott*, 337 F.3d 1193, 1202 n.5 (10th Cir. 2003) (lamenting with regard to § 2254(d)’s limitation on habeas relief that “[t]he Supreme Court has not defined ‘objectively unreasonable’ with any degree of precision”).

¹⁴⁷ Hoffmann and King do acknowledge that “[t]he Court also would have to remain open to the possibility that subsequent developments in a particular state, such as a subsequent decision to abolish or curtail postconviction review, might require revisiting the Suspension Clause issue.” Hoffmann & King, *supra* note 18, at 846.

¹⁴⁸ *See id.*

¹⁴⁹ *Boumediene v. Bush*, 553 U.S. 723, 774 (2008).

¹⁵⁰ 342 U.S. 205 (1952).

*Swain v. Pressley*¹⁵¹—both gave individual prisoners access to savings clauses “providing that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective.”¹⁵² As noted in *Boumediene*, “[t]he Court placed explicit reliance upon these provisions in upholding the statutes against constitutional challenges.”¹⁵³ Hoffmann and King do not specify whether their proposed statutory revision would include a savings clause of its own. If it would not, then *Boumediene* strongly suggests that the revision would be vulnerable on its face; if it would, then that savings clause would be available for use by individual state prisoners raising as-applied challenges. And use it they most certainly would.

The combination of a statutory savings clause and the Suspension Clause’s guarantee of “a meaningful opportunity to demonstrate that [they are] being held pursuant to ‘the erroneous application or interpretation’ of relevant law”¹⁵⁴ would be nothing short of a litigation bonanza for state prisoners. Even assuming that every state’s current system for postconviction review could survive a facial challenge under that standard, the as-applied challenges would be nearly endless. Is a prisoner deprived of the requisite “meaningful opportunity” if his colorable claim of constitutional error based on nonrecord evidence is denied on the merits without an evidentiary hearing?¹⁵⁵ Or if his claim is dismissed without merits review due to improper application of a state procedural rule?¹⁵⁶ Or if the state court ignores or unrea-

¹⁵¹ 430 U.S. 372 (1977).

¹⁵² *Boumediene*, 553 U.S. at 776.

¹⁵³ *Id.*

¹⁵⁴ *Boumediene*, 553 U.S. at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

¹⁵⁵ See, e.g., *Conaway v. Polk*, 453 F.3d 567, 589 (4th Cir. 2006) (remanding a capital case for an evidentiary hearing where petitioner “reasonably attempted, in light of the information available to him at the relevant times, to investigate and pursue the Juror Bias claim in state court[, but h]is efforts were thwarted . . . by reluctant witnesses and unreceptive courts”); *Wilson v. Beard*, 426 F.3d 653, 665–66 (3d Cir. 2005) (rejecting respondent’s challenge to the district court’s decisions to hold an evidentiary hearing and to grant relief and stating that “[i]f a petitioner requests a hearing to develop the record on a claim in state court, and if the state courts (as they did here) deny that request on the basis of an inadequate state ground, the petitioner has not ‘failed to develop the factual basis of [the] claim in State court proceedings’ for purposes of § 2254(e)(2)” (alteration in original)); *Guidry v. Dretke*, 397 F.3d 306, 323–24 (5th Cir. 2005) (stating that in light of “quite legitimate concerns about conflicting evidence” in the state court record and state court’s failure to resolve important factual issues, the district court did not abuse its discretion in holding evidentiary hearing).

¹⁵⁶ See, e.g., *Bell v. Miller*, 500 F.3d 149, 154–55 (2d Cir. 2007) (declining to enforce a state court’s default determination because the underlying state rule was not regularly applied to claims like petitioner’s); *Hartman v. Bagley*, 492 F.3d 347, 356 (6th Cir. 2007) (rejecting the state postconviction court’s determination that the claim should have been raised on direct appeal and was therefore res judicata and explaining that the claim “was based primarily on a forensic psychology report that was, in fact, outside the [trial] record”); *Anderson v. Morrow*, 371 F.3d 1027, 1031 (9th Cir. 2004) (declining to enforce the

sonably applies the governing federal constitutional standard?¹⁵⁷ And would state court review be sufficiently “meaningful” if it ended with the judge adopting verbatim the state’s adversarial pleading as the order of the court?¹⁵⁸ Or with a single-line, unexplained declaration that the application for postconviction relief is denied?¹⁵⁹ These issues and others arise routinely in state postconviction challenges across the country, and they would all be fodder for Suspension Clause challenges under Hoffmann and King’s regime.

Resolution of these questions, of course, would require the development of a far richer and more nuanced body of Suspension Clause jurisprudence than exists today.¹⁶⁰ While Hoffmann and King assume this task could be accomplished quickly by the Supreme Court, perhaps even in as little as “one or two consolidated cases,”¹⁶¹ AEDPA litigation suggests otherwise. The Court waited four years after the Act’s effective date before even beginning the process of construing three of its most important provisions,¹⁶² and even now—a decade

state court’s default finding based on a rule not in effect at the time petitioner’s default was alleged to have occurred).

¹⁵⁷ See, e.g., *McGahee v. Ala. Dep’t of Corr.*, 560 F.3d 1252, 1261–62 (11th Cir. 2009) (granting relief on a *Batson v. Kentucky* claim rejected by the state court after unduly narrow analysis and observing that, “where a legal standard requires a state court to review all of the relevant evidence to a claim, the state court’s failure to do so is an unreasonable application of law”); *Mahler v. Kaylo*, 537 F.3d 494, 500, 503 (5th Cir. 2008) (granting relief on a *Brady v. Maryland* claim and noting that state court’s rejection of claim had “focused solely and unreasonably upon” an issue that “was inapposite to the question at the heart of [the case]”); *Goodman v. Bertrand*, 467 F.3d 1022, 1030–31 (7th Cir. 2006) (granting relief on an ineffective assistance of counsel claim after finding, *inter alia*, that, “[i]n weighing each [of trial counsel’s] error[s] individually, the Wisconsin Court of Appeals overlooked a pattern of ineffective assistance and unreasonably applied *Strickland* [*v. Washington*]”).

¹⁵⁸ See, e.g., *Rhode v. Hall*, 582 F.3d 1273, 1281 (11th Cir. 2009) (“[T]he state habeas court adopted verbatim the State’s proposed order as its own.”); *Kittelson v. Dretke*, 426 F.3d 306, 314 (5th Cir. 2005) (“[T]he state habeas court adopted, verbatim, respondent’s proposed findings of fact, finding no basis for habeas relief.”); *Young v. Catoe*, 205 F.3d 750, 755 n.2 (4th Cir. 2000) (noting that the state postconviction court adopted “almost verbatim the state’s legal memorandum in opposition to [the petitioner’s] Application for Post-Conviction Relief”).

¹⁵⁹ See, e.g., *Wade v. Herbert*, 391 F.3d 135, 142 (2d Cir. 2004) (“Because the [New York] Appellate Division gave no explanation beyond saying that the claim was ‘without merit,’ we cannot know the exact basis of its reasoning.”); *Reid v. True*, 349 F.3d 788, 799 (4th Cir. 2003) (describing the analysis to be undertaken “when the state court has not articulated the rationale for its decision”); *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000) (“Our examination of the state court’s decision is impeded in this case because no rationale for its conclusion was supplied.”); see also Monique Anne Gaylor, Note, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 HOFSTRA L. REV. 1263, 1285 (2003) (arguing that summary state court dismissals are not adjudications on the merits).

¹⁶⁰ See Hoffmann & King, *supra* note 18, at 846 (“Suspension Clause jurisprudence is not well developed.”).

¹⁶¹ *Id.*

¹⁶² See *Artuz v. Bennett*, 531 U.S. 4 (2000) (construing § 2244(d)(2)’s “properly filed” clause); (Michael) *Williams v. Taylor*, 529 U.S. 420 (2000) (construing § 2254(e)(2)’s lim-

after those cases were decided—the work of interpreting and administering the habeas statutes continues unabated.¹⁶³ We see no reason to believe a new fabric of Suspension Clause law would be woven any faster under the revisions proposed by Hoffmann and King.¹⁶⁴

This scenario gives rise to an inescapable irony. While Hoffmann and King's proposal would generate a nearly endless series of challenges whose resolution would demand rapid development in an area of law that has managed to remain nascent for more than two centuries, the circumstances giving rise to those same challenges have already been encountered and assimilated during the evolution of the current habeas-review scheme. It is well settled, for example, that a state court's arbitrary refusal to grant an evidentiary hearing on a colorable claim for relief will authorize a hearing in federal court.¹⁶⁵ A state court's refusal to consider a claim based on misapplication of a state procedural rule results in plenary, de novo review in federal habeas litigation.¹⁶⁶ A state court's failure to recognize or reasonably apply controlling constitutional principles does not bind the federal court but instead permits de novo review and, where warranted, a grant of relief.¹⁶⁷ And where the form of a state court's decision sug-

ited prohibition against federal evidentiary hearings); (Terry) Williams v. Taylor, 529 U.S. 362 (2000) (construing § 2254(d)'s limitation on relief).

¹⁶³ See Pinholster v. Ayers, 590 F.3d 651 (9th Cir. 2009), *cert. granted sub nom.* Cullen v. Pinholster, 130 S. Ct. 3410 (2010) (granting certiorari to determine, *inter alia*, whether 28 U.S.C. § 2254(d)(1) analysis accommodates facts not considered by the state court during prior adjudication); Kholi v. Wall, 582 F.3d 147 (1st Cir. 2009), *cert. granted*, 130 S. Ct. 3274 (2010) (granting certiorari to determine whether a state court motion for sentence reduction constitutes an application for State postconviction or other collateral review for purposes of 28 U.S.C. § 2244(d)(2)); Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009) (en banc), *cert. granted sub nom.* Harrington v. Richter, 130 S. Ct. 1506, 1506–07 (2010) (granting certiorari to determine, *inter alia*, whether 28 U.S.C. § 2254(d) applies “to a state court’s summary disposition of a claim, including a claim under *Strickland v. Washington*, 466 U.S. 668 (1984)”).

¹⁶⁴ It is also plausible that the Court could respond to a Suspension Clause challenge to a repeal (or virtual repeal) of § 2254 by holding that the clause only protects the writ of habeas corpus as it stood in 1787. In that event, *Mathews v. Eldridge*, 424 U.S. 319 (1976), analysis—to which the Court exhibited its commitment in *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004)—would generate litigation indefinitely.

¹⁶⁵ See 28 U.S.C. § 2254(e)(2) (2006); (*Michael*) Williams, 529 U.S. at 437; Keeney v. Tamayo-Reyes, 504 U.S. 1, 7–12 (1992).

¹⁶⁶ See, e.g., Lee v. Kemna, 534 U.S. 362, 387 (2002); Brown v. Simons, 515 F.3d 1072, 1087 (10th Cir. 2008) (“If the state court did not decide [petitioner’s] federal claim on the merits, and the claim is not otherwise procedurally barred, we address the claim de novo and AEDPA deference does not apply.” (emphasis omitted) (quoting Harris v. Poppell, 411 F.3d 1189, [1195] (10th Cir. 2005)); Lenz v. Washington, 444 F.3d 295, 302 (4th Cir. 2006) (rejecting respondent’s invocation of state procedural bar and stating that, “[b]ecause there is no state court judgment on the merits, we review de novo”); Graves v. Dretke, 442 F.3d 334, 339 (5th Cir. 2006) (holding that a state court’s rejection of petitioner’s claim as an abuse of the writ did not constitute an adjudication on the merits and that, as a result, 28 U.S.C. § 2254(d) was inapplicable).

¹⁶⁷ See, e.g., Rompilla v. Beard, 545 U.S. 374, 390 (2005); Wiggins v. Smith, 539 U.S. 510, 520–21 (2003); (Terry) Williams, 529 U.S. at 407–13.

gests it was rendered using something less than the level of care befitting resolution of an important constitutional issue, federal courts have the flexibility to adjust their approach accordingly.¹⁶⁸

Thus, Hoffmann and King's bid to eliminate waste and accelerate collateral review would, in the end, amount to scrapping an evolved and complex scheme we already know to make way for the development—through arduous, case-by-case litigation—of a new but equally complex scheme whose contours remain to be determined. This would be poor policy and a massive waste of judicial and litigant resources.

C. Hoffmann and King's Federal Agency/Voluntary Grant Alternative to Noncapital Habeas Corpus

In place of—but *not* in exchange for—federal habeas review of noncapital convictions, Hoffmann and King propose that “[w]hatever can be saved by cutting back on habeas review—and additional funds—should be devoted to a new federal initiative aimed at helping the states prevent and correct constitutional violations in their own courts.”¹⁶⁹ This new initiative would involve the “creation of a new Federal Center for Defense Services”¹⁷⁰ tasked with administering “matching grants and other financial incentives for state and local governments to improve . . . defense representation,”¹⁷¹ performing and publicizing relevant empirical research, and presiding over a “special Superfund-type grant program” aimed at quickly improving defense representation in “states and localities with egregious problems.”¹⁷² Hoffmann and King acknowledge that funding their “proposal will require extraordinary political commitment, especially in recessionary times,”¹⁷³ but they believe it is nevertheless a “realistic possibility” because it could be implemented gradually and participation by the states would be strictly voluntary.¹⁷⁴

We agree that defense representation at the state trial court level is woefully inadequate in many parts of the nation and that real im-

¹⁶⁸ See, e.g., *Luna v. Cambra*, 306 F.3d 954, 960–61 (9th Cir. 2002) (“When we are confronted with a state court’s ‘postcard denial,’ . . . we have nothing to which we can defer. Accordingly, we must conduct an independent review of the record . . . to determine whether the state court clearly erred in its application of controlling federal law.” (footnote omitted) (citation omitted) (internal quotations omitted)); *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir. 1998) (“Where, as here, there is no indication of how the state court applied federal law to the facts of a case, a federal court must necessarily perform its own review of the record.” (citation omitted)); see also cases cited *supra* note 159.

¹⁶⁹ Hoffmann & King, *supra* note 18, at 823–24.

¹⁷⁰ *Id.* at 828.

¹⁷¹ *Id.* at 829.

¹⁷² *Id.* at 831.

¹⁷³ *Id.* at 833.

¹⁷⁴ See *id.* at 834.

provement at that all-important phase is highly desirable for a host of reasons. We also have no quarrel with the suggestion that a national initiative involving something like a Federal Center for Defense Services would be a sensible vehicle for attempting to bring about reform. But embracing these ideals is the easy part; the difficulty lies in moving them from concept to practice, and Hoffmann and King's implementation plan strikes us as implausible.

To have any chance of succeeding, the new federal initiative that Hoffmann and King advocate would require, at a minimum, a massive amount of federal money, a commitment by Congress and the President to spend that money on indigent defense, and a willingness on the part of the states to commit their own resources to improving defense representation. None of these ingredients are in good supply, and Hoffmann and King offer no real insight into how to change that stubborn reality.

The first sign of trouble comes in the third sentence of the portion of their essay laying out their proposal for the new federal initiative. There, they identify the funding source for revolutionizing indigent criminal defense as "[w]hatever can be saved by cutting back on habeas review—and additional funds."¹⁷⁵ Given the number of times by that point that Hoffmann and King have labeled habeas review a "waste" of money or resources,¹⁷⁶ we read expectantly for their estimate of the federal and state dollars waiting to be liberated by the elimination of noncapital habeas review—but no estimate ever appears. Nor do they attempt any projection of the cost to establish and operate the new federal initiative. Nor do they make any suggestions for finding "additional funds" in a federal budget already running the largest deficit in the nation's history. We understand the difficulty in offering precise dollar figures for a proposal like Hoffmann and King's, but without at least a rough but plausible estimate of the money to be saved and the money to be spent, it is impossible to evaluate the proposal.

¹⁷⁵ *Id.* at 823.

¹⁷⁶ See, e.g., *id.* at 793 ("The present approach is a failure because it wastes federal resources . . ."); *id.* at 796 ("[W]e should no longer support a wasteful system that relies on duplicative posttrial litigation . . ."); *id.* at 812 ("And if the state courts are doing a good job on their own, independent of any habeas deterrence, then habeas is a colossal waste of resources."); *id.* at 818 ("The resources now wasted on reviewing and rejecting claims of constitutional error in habeas litigation should be redeployed . . ."); *id.* at 823 ("The point of reducing wasteful federal habeas litigation is not simply to conserve scarce resources."); *id.* at 834 ("[A]ll states currently endure the same wasteful habeas litigation in federal court . . ."); *id.* at 847 ("This Essay addresses . . . the federal government's failure to develop an alternative to wasteful federal habeas review as a way to enforce constitutional criminal procedure rights in state criminal cases . . .").

We are also unpersuaded by Hoffmann and King's case for the "[p]olitical [v]iability" of their proposal.¹⁷⁷ Starting from the premise that "voluntary programs that offer the states the choice of whether or not to participate may be politically viable . . . while expressly tying habeas reform to representation reform may not be," Hoffmann and King propose to dismantle federal habeas immediately and then attempt to ply the states into voluntarily reforming indigent defense "gradually," if at all.¹⁷⁸ While it may well be true that insufficient political will exists—in Congress or in the states—to institute meaningful indigent-defense reform, we cannot fathom how that condition could be improved by giving the states a windfall up front and then hoping they will warm to reform (which they have historically resisted) at some point down the road.¹⁷⁹ That is equivalent to assigning the fox to guard the henhouse and then hoping he decides to become a vegetarian.

Hoffmann and King cite "the legislative history of the Innocence Protection Act" (IPA) as support for the approach they suggest.¹⁸⁰ The IPA, however, is hardly a model for bringing about fundamental systemic reform. For one thing, it mandates that "[e]ach State receiving a grant . . . shall allocate the funds equally between the [prosecution and defense]."¹⁸¹ It may be that the prosecution needs additional funds for investigation, but that type of apportionment is unlikely to be an *efficient* way to protect the innocent. In any event, the IPA has also yielded little in the way of results during its first five years in existence.¹⁸² Indigent state court defendants cannot afford to wait that long (or longer) for reforms to take shape, especially if they are asked to do so without access to federal habeas review.

The assumption that state authorities would be motivated to participate in reform efforts absent a strong incentive to do so also vastly

¹⁷⁷ *Id.* at 833–34.

¹⁷⁸ *Id.* at 834 (emphasis omitted).

¹⁷⁹ Hoffmann and King justify this by observing that

[a]t least when it comes to noncapital cases, so little benefit would be lost by cutting back on habeas review, and so much more could be gained by any shift of those resources toward encouraging and supporting improvements in state defense representation, that we need not adopt a quid pro quo arrangement that could pose an unwarranted political barrier to state reform efforts.

Id. That conception, however, is a shortsighted approach to engineering a set of conditions likely to spur state-based reforms. For while Hoffmann and King may deem habeas to be worthless as a *remedy*, the prospect of its elimination as a *consumer of resources* could still be seen by the states as something worth paying for in the currency of reform.

¹⁸⁰ *Id.*

¹⁸¹ 42 U.S.C. § 14163e(b) (2006).

¹⁸² See generally *Reauthorization of the Innocence Protection Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Lynn Overmann, Senior Advisor, Office of Justice Programs).

underestimates the level of resistance many of them exhibit toward the very notion of improving the quality and capacity of indigent defense.¹⁸³ There is no better illustration of that resistance than the response by the states to the “opt-in” scheme for capital cases enacted in 1996 as part of AEDPA. Under that scheme, states were offered an extremely favorable set of rules for the litigation of capital habeas cases, including a 180-day limitations period,¹⁸⁴ greater restrictions on the scope of merits review,¹⁸⁵ and strict time limits for disposition of cases by the federal courts.¹⁸⁶ In exchange for the right to litigate capital cases under such favorable conditions, the states were asked to establish a mechanism for the appointment and payment of qualified state postconviction counsel and the reimbursement of reasonable litigation expenses.¹⁸⁷ Although many states sought the rewards offered by this scheme,¹⁸⁸ not one was willing to do what it took to satisfy the

¹⁸³ See, e.g., Editorial, *Florida Can't Cut Corners in Death Cases*, ST. PETERSBURG TIMES, Nov. 8, 2008, at 12A (describing “years of failed attempts by the Legislature and former Gov. Jeb Bush to constrain the amount of effort death penalty attorneys may exert on behalf of their clients” and noting that former Gov. Bush’s partial privatization of capital postconviction representation had led to missed federal limitations periods “[i]n at least 25 [Florida capital] cases”); James C. McKinley, Jr., *Texas Governor Defends Shakeup of Commission*, N.Y. TIMES, Oct. 2, 2009, at A16 (describing Texas governor Rick Perry’s replacement of three members of Texas Forensic Science Commission “just 48 hours before the commission was to hear testimony” indicating that Cameron T. Willingham had been executed for a crime he did not commit).

¹⁸⁴ See 28 U.S.C. § 2263 (2006).

¹⁸⁵ See *id.* § 2264.

¹⁸⁶ See *id.* § 2266.

¹⁸⁷ See *id.* § 2261.

¹⁸⁸ See, e.g., *Hall v. Luebbers*, 341 F.3d 706, 712 (8th Cir. 2003) (rejecting Missouri’s claim of opt-in status); *Spears v. Stewart*, 283 F.3d 992, 1019 (9th Cir. 2002) (holding that the state’s failure to comply with Arizona’s facially sufficient Chapter 154 mechanism prevented it from benefiting from the opt-in provisions); *Bowersox*, 231 F.3d 460, 462 (8th Cir. 2000) (holding that Missouri does not qualify under Chapter 154); *Baker v. Corcoran*, 220 F.3d 276, 285–87 (4th Cir. 2000) (affirming the district court’s rejection of Maryland’s claim of opt-in status); *Tucker v. Catoe*, 221 F.3d 600, 604–05 (4th Cir. 2000) (rejecting South Carolina’s claim of opt-in status); *Perillo v. Johnson*, 205 F.3d 775, 793 (5th Cir. 2000) (“Texas has not opted into the separate provisions of AEDPA making the statute retroactive for death penalty cases”); *Ashmus v. Woodford*, 202 F.3d 1160, 1170 (9th Cir. 2000) (holding that California failed to meet the opt-in requirements of Chapter 154); *Green v. Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997) (same, as to Texas); *Brown v. Puckett*, No. 3:01CV197-D, 2003 WL 21018627, at *2–3 (N.D. Miss. Mar. 12, 2003) (same, as to Mississippi); *Kasi v. Angelone*, 200 F. Supp. 2d 585, 592–93 n.2 (E.D. Va. 2002) (same, as to Virginia); *Smith v. Anderson*, 104 F. Supp. 2d 773, 786 (S.D. Ohio 2000) (same, as to Ohio); *Ward v. French*, 989 F. Supp. 752, 757 (E.D.N.C. 1997) (same, as to North Carolina), *aff’d*, 165 F.3d 22 (4th Cir. 1998); *Williams v. Cain*, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (same, as to Louisiana), *aff’d in part, rev’d in part on other grounds*, 125 F.3d 269 (5th Cir. 1997); *Ryan v. Hopkins*, No. 4:CV95-3391, 1996 WL 539220, at *3–4 (D. Neb. July 31, 1996) (concluding that Nebraska’s framework for appointing counsel in postconviction capital cases was not in compliance with 28 U.S.C. § 2261(b)–(c)); *Austin v. Bell*, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (same, as to Tennessee).

requirements for “opt-in” status.¹⁸⁹ The parallels between the opt-in experiment and Hoffmann and King’s proposals are self-evident; indeed, the two biggest barriers to opt-in compliance—cost and political unpopularity—are both higher in the absence of a quid pro quo. Nonetheless, Hoffmann and King make no attempt to explain why states should be trusted to institute reforms without an incentive when many of those same states could not produce far less dramatic reforms, even when a strong incentive was well within their reach.

IV

AN ALTERNATIVE PROPOSAL FOR HABEAS REFORM

If, as Hoffmann and King suggest, the chief problems with the existing noncapital habeas review scheme are too much volume (and corresponding cost) and too little success, then we would offer a different recipe for fixing them. The most obvious solution to the problem of too many habeas filings is to stop imprisoning so many people for such long periods of time. Although a detailed discussion of incarceration policy is outside the scope of this Article,¹⁹⁰ we think it is fair to observe that as the world’s leader in imprisonment rates,¹⁹¹ the United States has nowhere to go but down. For those who must remain incarcerated, the states might also consider reversing the trend toward depriving prisoners of the chance to make constructive use of their time behind bars through access to educational, vocational, and employment opportunities.¹⁹² Such a suggestion may not be popular

¹⁸⁹ Arizona came the closest to achieve this status. While its mechanism for selecting and compensating postconviction counsel was found to be facially satisfactory in one case, a lengthy delay in the appointment of counsel prevented it from achieving “opt-in” status. *See Spears*, 283 F.3d at 996–97.

After a decade in which no state demonstrated the capacity to satisfy the modest requirements of the 1996 statutes, Congress amended the “opt-in” scheme as part of the Patriot Improvement and Reauthorization Act of 2005 (PIRA), Pub. L. No. 109-177, 120 Stat. 192 (2006). Among other changes, PIRA lowered the bar by stripping federal courts of authority to determine a state’s opt-in status and instead conferring both that authority and the power to promulgate regulations governing opt-in qualification and procedures in the Attorney General. *See* 28 U.S.C. § 2265. To date, no final regulations have been implemented, and the entire scheme has effectively been placed on indefinite hold.

¹⁹⁰ For a discussion of this issue, see, for example, Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 431–36, 444–50 (2009); John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547, 550–65 (2008); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1102–08; Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 247–64 (2009); *see also* Editorial, *California’s Crowded Prisons*, N.Y. TIMES, Feb. 14, 2009, at A22; Editorial, *Racial Inequity and Drug Arrests*, N.Y. TIMES, May 10, 2008, at A18; Ben Trachtenberg, *Incarceration Policy Strikes Out*, A.B.A. J., Feb. 2009, at 66.

¹⁹¹ *See* WALMSLEY, *supra* note 109.

¹⁹² *See, e.g.*, Laura A. Bischoff, *Prison Labor Saves Taxpayers Money*, DAYTON DAILY NEWS, Jan. 31, 2010, at A1 (providing statistics on how prison labor correlates to lower rates of recidivism); Michael Rothfeld, *The California Fix: Cuts Dim Inmates’ Hope for New Lives*, L.A.

with today's "tough on crime" politician, but it does make sense. Merely warehousing prisoners, as is done throughout much of the country today, serves the basic purpose of keeping them off the street during their terms of incarceration, but it also leaves them with ample time to pursue frivolous legal challenges and increases the likelihood of recidivism.¹⁹³ Conversely, given an opportunity to learn, train, or work, prisoners can pass the time more quickly and productively and can even begin to reclaim a measure of dignity and self-respect that can make the difference between a model prisoner and a litigious malcontent, or between a reformed ex-con and a repeat offender.¹⁹⁴

Congress could effectively address the problem of too little success in noncapital habeas by modifying, rather than abandoning, the current scheme. Although Hoffmann and King quickly dismiss this approach as politically and economically impossible, we believe that real systemic benefits—at least some of which can be objectively viewed as politically colorable—could be gained through one or more adjustments to the present system.

Consider, for example, the impact that could be made by jettisoning the *Wainwright v. Sykes*¹⁹⁵ procedural-default doctrine. Under the current scheme, federal habeas courts and the parties before them spend countless hours wrangling over technicalities such as whether the state court rested its judgment on a state procedural rule,¹⁹⁶ whether that rule was "adequate"¹⁹⁷ or "independent,"¹⁹⁸ whether the rule was "firmly established"¹⁹⁹ and "consistently or regularly ap-

TIMES, Oct. 17, 2009, at A1 (explaining that programs to train prisoners help ready them for life after release from prison).

¹⁹³ See, e.g., William D. Bales et al., *Substance Abuse Treatment in Prison and Community Reentry: Breaking the Cycle of Drugs, Crime, Incarceration, and Recidivism?*, 13 GEO. J. ON POVERTY L. & POL'Y 383, 385–89 (2006); Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L.J. 536, 541–50 (2006); Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL'Y 261, 261–65 (2006).

¹⁹⁴ Contrary to popular belief, most prisoners would jump at an opportunity for employment, even at wages far below those paid to free workers. Between us, we have met and talked with scores of inmates, and other than those too mentally or physically ill to work, we have yet to find one who would rather spend the day in his cell than get up and do something engaging or productive.

¹⁹⁵ 433 U.S. 72 (1977).

¹⁹⁶ See *Harris v. Reed*, 489 U.S. 255, 266 (1989).

¹⁹⁷ See *Lee v. Kemna*, 534 U.S. 362, 387 (2002) (holding that no adequate state ground barred federal habeas review).

¹⁹⁸ See *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (explaining that the state court's application of procedural bar does not preclude federal merits review when the state court ruling involved consideration of a federal question).

¹⁹⁹ See *Ford v. Georgia*, 498 U.S. 411, 423–24 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348–51 (1984)).

plied,”²⁰⁰ and whether “cause and prejudice”²⁰¹ or a “miscarriage of justice”²⁰² permit merits review of a defaulted claim.²⁰³ Each of these intensive inquiries slows the pace of habeas litigation and adds to the workload of judges, court personnel, and states’ attorneys. It does so, moreover, in service of a doctrine whose main effect is to prevent merits review of claims of constitutional error—the very claims the statutory grant of habeas jurisdiction was intended to reach in the first place.²⁰⁴

Eliminating the statute of limitations for noncapital habeas cases could also dramatically improve the efficiency and effectiveness of habeas review. Although its enactment as part of AEDPA ostensibly intended to reduce delay in the filing of habeas petitions,²⁰⁵ as applied to noncapital cases, it has largely been a solution in search of a problem. Whether prisoners under sentence of death commonly seek delay may be disputed, but noncapital prisoners clearly have no incentive to prolong the litigation of their cases; if they believe they have a winning issue, the prospect of success (and accompanying release or sentence reduction) is more than sufficient inducement to put that issue before a court and seek a decision as quickly as possible.

Although the limitations period thus does little, if anything, to encourage noncapital prisoners who will ultimately file to do so more quickly, it does much to increase the number of petitions filed. As reflected in the spike of filings that occurred in the years immediately following its implementation,²⁰⁶ the limitations period encourages

²⁰⁰ See *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *James*, 466 U.S. at 348–49. “Consistency” analysis can be particularly labor intensive, as it often involves gathering and carefully examining multiple state court decisions referencing or applying either the procedural rule at issue or exceptions to that rule, tabulating application of the rule and the exceptions, and charting the state courts’ trends and practices over time. See, e.g., Brief for Respondent at 15–56, *Beard v. Kindler*, 130 S. Ct. 612 (2009) (No. 08-992) (detailing development and application of Pennsylvania’s fugitive forfeiture rule in support of argument that rule was not adequate to foreclose merits review in federal habeas proceeding).

²⁰¹ See *Cone v. Bell*, 129 S. Ct. 1769, 1778 (2009).

²⁰² See *Schlup v. Delo*, 513 U.S. 298, 326 (1995).

²⁰³ According to the 2007 study, “13.3% of 1986 non-transferred terminated cases, and 19.4% of non-transferred terminated cases with claims information[] included a [district court] ruling that a claim was defaulted.” KING ET AL., *supra* note 19, at 48. The study report does not indicate how many of these cases included a finding that merits review was appropriate based on a showing of “cause and prejudice.”

²⁰⁴ See 28 U.S.C. § 2254(a) (2006) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”).

²⁰⁵ See *Woodford v. Garceau*, 538 U.S. 202, 206 (2003).

²⁰⁶ JOHN SCALIA, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 1 (2002) (“The 1996 Antiterrorism and Effective Death Penalty Act appears to have resulted in an increase in the number of habeas corpus petitions filed by State prison inmates. State prison inmates filed 50% more habeas corpus petitions during 2000 (21,345) than during 1995 (13,627).”).

prisoners to take a “use it or lose it” approach to federal habeas review. Undoubtedly some prisoners realize their prospects for success are dim, but they also realize their window of opportunity for habeas review is small, and so they take their chance. Without a limitations period driving them forward, many of these prisoners would bide their time hoping for improvements in the evidence, the law, or both—and many more would end up simply foregoing a habeas petition altogether.

In addition to providing an incentive to file quickly where none is necessary, the limitations period adds a substantial measure of complexity to an already challenging area of the law. Since 2000, the Supreme Court has decided seventeen cases presenting habeas statute of limitations issues²⁰⁷—an average of two per Term—and there is no end in sight.²⁰⁸ To facilitate the timeliness assessment in every case, a court must determine, among other things, when the state court judgment became “final,”²⁰⁹ whether the prisoner filed an “application for state post-conviction or other collateral review,”²¹⁰ whether any such application was “properly filed,”²¹¹ how long a properly filed applica-

²⁰⁷ See *Holland v. Florida*, 130 S. Ct. 2549 (2010); *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009); *Allen v. Siebert*, 552 U.S. 3 (2007) (per curiam); *Lawrence v. Florida*, 549 U.S. 327 (2007); *Hill v. McDonough*, 547 U.S. 573 (2006); *Day v. McDonough*, 547 U.S. 198 (2006); *Evans v. Chavis*, 546 U.S. 189 (2006); *Mayle v. Felix*, 545 U.S. 644 (2005); *Dodd v. United States*, 545 U.S. 353 (2005); *Pace v. DiGuglielmo*, 544 U.S. 408 (2005); *Johnson v. United States*, 544 U.S. 295 (2005); *Rhines v. Weber*, 544 U.S. 269 (2005); *Pliler v. Ford*, 542 U.S. 225 (2004); *Clay v. United States*, 537 U.S. 522 (2003); *Carey v. Saffold*, 536 U.S. 214 (2002); *Duncan v. Walker*, 533 U.S. 167 (2001); *Artuz v. Bennett*, 531 U.S. 4 (2000).

²⁰⁸ See *Wall v. Kholi*, 130 S. Ct. 3274 (2010) (granting certiorari to consider whether state court motion for sentence reduction constitutes an “application for State post-conviction or other collateral review” for purposes of 28 U.S.C. § 2244(d)(2)).

²⁰⁹ See 28 U.S.C. § 2244(d)(1)(A). This inquiry can frequently be challenging. See, e.g., *Jimenez*, 129 S. Ct. at 686–87 (analyzing effect on “finality” of state court’s allowance of out-of-time direct appeal); *Wilson v. Cain*, 564 F.3d 702, 705–06 (5th Cir. 2009) (examining effect on finality of rehearing motion filed under LA. SUP. CT. R. IX, § 6); *McCloud v. Hooks*, 560 F.3d 1223, 1229–30 (11th Cir. 2009) (noting that Alabama law provided “no clear answer” to whether counts merged at trial level pursuant to ALA. R. CRIM. P. 13.3(c) should be deemed to share common finality date for purposes of federal limitations period calculation).

²¹⁰ See 28 U.S.C. § 2244(d)(2). Determining what does and does not constitute an “application for state post-conviction or other collateral review” can also be a difficult task. See, e.g., *Wion v. Quarterman*, 567 F.3d 146, 147–48 (5th Cir. 2009) (reversing a grant of relief after determining that petitioner’s “request for special review” of a parole-related challenge did not qualify for tolling under § 2244(d)(2)); *Hutson v. Quarterman*, 508 F.3d 236, 239–40 (5th Cir. 2007) (per curiam) (holding that “a motion to test DNA evidence under Texas Code of Criminal Procedure article 64 constitutes ‘other collateral review’ and thus tolls the AEDPA’s one-year limitations period under 28 U.S.C. § 2244(d)(1)”; *Hartmann v. Carroll*, 492 F.3d 478, 484 (3d Cir. 2007) (holding that “a motion for sentence reduction properly filed pursuant to Delaware Superior Court Criminal Rule 35(b) does not have the effect of tolling the limitations period set forth in 28 U.S.C. § 2244(d)(1)”).

²¹¹ See 28 U.S.C. § 2244(d)(2); *Pace*, 544 U.S. at 415–17; *Artuz*, 531 U.S. at 8–10; see also, e.g., *Chaffer v. Prosper*, 542 F.3d 662, 662–63 (9th Cir. 2008) (certifying questions relevant

tion remained “pending,”²¹² how much time elapsed between the finality date and the filing of the state court application, and the time between the denial of the state court application and the filing of the federal petition. And those are the easy cases. In other cases, courts must determine the date on which new evidence could have been discovered through the exercise of due diligence²¹³ or the date on which a new rule was made retroactive.²¹⁴ Still other cases require a highly case-specific balancing of factors to determine a prisoner’s eligibility for equitable tolling.²¹⁵ Gathering and processing the information necessary to make these calculations is a tedious, time-consuming business for litigants and courts alike, and it is difficult to imagine that many judicial tears would be shed if the limitations period were to be made inapplicable to noncapital cases.

Finally, the statute of limitations operates to deny a significant number of claims in capital and noncapital cases. The point of a statute of limitations is to encourage early filings, not to cut off potentially meritorious claims; dismissing late petitions is a negative consequence, but hopefully a rare one justified by the compliance it achieves in the vast majority of cases. Hoffmann and King’s data reflect a high rate of dismissals—not surprising given the complexity of the law and the lack of appointed counsel—which provides yet another argument for abolishing the statute of limitations.

The statutory limitation on habeas relief contained in 28 U.S.C. § 2254(d) is also a candidate for elimination.²¹⁶ Widely regarded as a centerpiece of AEDPA’s habeas reforms, § 2254(d) was ostensibly designed to heighten respect for state court judgments by mandating that they be left undisturbed unless the state court’s adjudication of a claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law” or “was

to the “properly filed” analysis to California Supreme Court); *Walker v. Norris*, 436 F.3d 1026, 1032 (8th Cir. 2006) (finding that petitioner’s noncompliance with the “verification” requirement of ARK. R. CRIM. P. 37 rendered state postconviction application not “properly filed”).

²¹² See 28 U.S.C. § 2244(d)(2); *Carey*, 536 U.S. at 219–21.

²¹³ 28 U.S.C. § 2244(d)(1)(D).

²¹⁴ *Id.* § 2244(d)(1)(C); see *Dodd v. United States*, 545 U.S. 353, 359–60 (2005).

²¹⁵ See *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (“We have not decided whether § 2244(d) allows for equitable tolling.”); *Urcinoli v. Cathel*, 546 F.3d 269, 276–78 (3d Cir. 2008) (granting equitable tolling after analyzing prior proceedings in detail and considering the unique circumstances presented by petitioner); *Downs v. McNeil*, 520 F.3d 1311, 1322–25 (11th Cir. 2008) (vacating the district court’s order dismissing the petition as untimely and remanding for an evidentiary hearing on petitioner’s contention that misconduct by appointed state postconviction counsel warranted equitable tolling); *Fleming v. Evans*, 481 F.3d 1249, 1256–57 (10th Cir. 2007) (similar); *Roy v. Lampert*, 465 F.3d 964, 967, 975–75 (9th Cir. 2006) (vacating dismissals and remanding consolidated cases for evidentiary hearings on petitioners’ allegations that temporary transfers to a private correctional facility interfered with their ability to file timely federal habeas petitions).

²¹⁶ See 28 U.S.C. § 2254(d).

based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”²¹⁷ Although this demanding new standard was expected to both accelerate the habeas review process and reduce the rate at which relief was granted, neither consequence has come to pass.²¹⁸ Instead, the principal impact of § 2254(d) has been to add yet another layer of complexity to habeas proceedings. For a typical claim, courts and parties must wrangle over whether the state court adjudicated the claim on its merits,²¹⁹ whether there is “clearly established Federal law” governing the claim,²²⁰ whether the state court understood and reasonably—but not necessarily *correctly*²²¹—applied that law in a manner consistent with the Supreme Court’s decisions,²²² and whether the state court reasonably determined the facts in light of the record evidence.²²³ Litigating and

²¹⁷ *Id.*

²¹⁸ For an empirical examination of § 2254(d)’s effects on relief rates, see Blume, *supra* note 39, at 285–87.

²¹⁹ The contours of such fights can vary widely, depending upon such factors as whether the state court issued a reasoned decision, *see, e.g.*, Fleming v. Metrish, 556 F.3d 520, 531–32 (6th Cir. 2009) (showing disagreement among the panel over whether the state court’s mistaken treatment of petitioner’s claim as procedurally barred and the resulting review for plain error constituted an “adjudication on the merits”); Wright v. Angelone, 151 F.3d 151, 156–57 (4th Cir. 1998) (rejecting the contention that a summary state court denial did not constitute an “adjudicat[ion] on the merits”); suggested the possibility of an independent procedural basis for denying relief, *see, e.g.*, Ryan v. Miller, 303 F.3d 231, 245–46 (2d Cir. 2002) (determining § 2254(d)’s applicability where the state court summarily rejected multiple claims as “either unpreserved for appellate review or without merit”); or acknowledged the federal constitutional basis for the claim, *see, e.g.*, DiBenedetto v. Hall, 272 F.3d 1, 6 (1st Cir. 2001) (“If the state court has not decided the federal constitutional claim (even by reference to state court decisions dealing with federal constitutional issues), then we cannot say that the constitutional claim was ‘adjudicated on the merits’ within the meaning of § 2254 . . .”).

²²⁰ 28 U.S.C. § 2254(d)(1); *see, e.g.*, Wright v. Van Patten, 552 U.S. 120, 124–25 (2008) (*per curiam*); Panetti v. Quarterman, 551 U.S. 930, 948–49 (2007); Carey v. Musladin, 549 U.S. 70, 72 (2006); Robinson v. Ignacio, 360 F.3d 1044, 1055–59 (9th Cir. 2004) (surveying decisions from multiple circuits in an effort to ascertain “clearly established federal law”); Newman v. Hopkins, 247 F.3d 848, 852–53 (8th Cir. 2001) (assembling the rule governing petitioner’s claim from six different Supreme Court decisions).

²²¹ *See* Williams v. Taylor, 529 U.S. 362, 410 (2000) (“[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.”).

²²² 28 U.S.C. § 2254(d)(1); Rompilla v. Beard, 545 U.S. 374, 389 (2005) (finding the state court’s rejection of petitioner’s ineffective assistance of counsel claim objectively unreasonable because it “fail[ed] to answer the considerations we have set out”); Williams, 529 U.S. at 405–09; *see also, e.g.*, McGahee v. Ala. Dep’t of Corr., 560 F.3d 1252, 1265–66 (11th Cir. 2009) (“Because the [state] court did not review ‘all relevant circumstances,’ . . . the decision [rejecting prisoner’s *Batson v. Kentucky* claim] was an unreasonable application of clearly established federal law . . .”); Harris v. Alexander, 548 F.3d 200, 206 (2d Cir. 2008) (granting relief on a jury-instruction claim where “the state decisions upholding [petitioner’s] conviction were egregiously at odds with the standards of due process propounded by the Supreme Court”); Norton v. Spencer, 351 F.3d 1, 8 (1st Cir. 2003) (granting relief on a *Brady v. Maryland* claim after finding state court’s denial of relief had been “utterly inconsistent with *Brady*”).

²²³ 28 U.S.C. § 2254(d)(2); Miller-El v. Dretke, 545 U.S. 231, 266 (2005); Wiggins v. Smith, 539 U.S. 510, 528 (2003); *see also, e.g.*, Julian v. Bartley, 495 F.3d 487, 494 (7th Cir.

resolving these issues and subissues is time-consuming, often tedious work for everyone involved, and given its negligible effect on outcomes in habeas cases, there is no sound reason to keep doing it. Eliminating § 2254(d)²²⁴ would liberate judicial and litigant resources to be used more efficiently, and it would do so with no meaningful, independent effect on relief rates.

Along with the elimination of rules that operate only to bar (e.g., procedural default and the limitations period) or complicate (§ 2254(d)) merits review while consuming valuable time and effort, any bid to improve the functionality and effectiveness of noncapital habeas review should include an expansion of the availability of appointed counsel. Although this would require allocation of new resources to the defender community, it would both save resources elsewhere and improve the overall effectiveness of noncapital habeas.²²⁵ Even basic assistance from competent counsel would result in a substantial reduction of the flow of frivolous or poorly conceived arguments raised in noncapital cases and produce a simultaneous increase in the quality of pleadings submitted on behalf of prisoners. Better claim selection and presentation would, in turn, lead to a reduction in the time and effort judges and states' attorneys would be required to devote to each case, thereby saving resources that could be reallocated as necessary. Moreover, this increase in the quality of representation and claim presentation would enhance the effectiveness of habeas review by increasing the likelihood that constitutional error would actually be detected and remedied rather than be overlooked by an ignorant pro se litigant, by an overworked judge, or by a clerk drowning in a sea of incomprehensible pro se filings.

Individually or in combination, changes like those outlined above would go a long way toward making noncapital habeas the kind of meaningful remedy Hoffmann and King might consider worth saving. Clearing away complex and distracting barriers to merits review would save judicial and litigant resources and accelerate the overall pace of

2007) (finding, in connection with a grant of relief on petitioner's ineffective assistance of counsel claim, that the state court's factual determination was "against the clear weight of the evidence and, therefore, an objectively unreasonable determination of undisputed facts"); *Berryman v. Morton*, 100 F.3d 1089, 1105 (3d Cir. 1996) (affirming a grant of relief on an ineffective assistance of counsel claim and observing that, "even applying the most conceivably deferential standard" to the state court's determinations, those determinations were unreasonable in light of the evidence).

²²⁴ *Teague v. Lane*, 489 U.S. 288 (1989), is also a good candidate for reform. Prior to AEDPA, *Teague* wrought much of the same mischief—and consumed much of the same time—that § 2254(d) has now taken over.

²²⁵ With proper staffing, existing federal public defender or community defender offices could absorb much of the work. A number of these offices already house units specializing in the litigation of capital habeas cases. The knowledge and experience these offices' personnel have accumulated in the capital context would transfer well to an expansion of services to noncapital clients.

the litigation, both of which should be attractive to state executives and conservative policy makers. At the same time, greater access to merits review would increase relief rates in deserving cases (i.e., those in which state courts failed to cure harmful constitutional violations). And higher relief rates in federal court would generate a greater deterrent effect on state courts and other state actors, which could, in turn, motivate those actors to pursue the kinds of trial-level reforms Hoffmann and King believe are necessary.

CONCLUSION

The Hoffmann and King essay is part of a larger project, a book that they hope will “provide a fresh perspective, as well as sound proposals for reform, that will help to dispel [the] negative perception” that habeas is “a prime source of vexatious, time-consuming, often abusive, and ultimately meritless litigation.”²²⁶ The draft of the first chapter of their book on habeas corpus lays out the premise behind their proposed reforms: “[H]abeas provides a remedy for individuals, but it is a remedy that is designed, at its core, to address fundamental problems with institutions of government.”²²⁷ Ultimately, we disagree. Habeas *is* for the individual who is wrongfully imprisoned—for the Clarence Moores of the world, whom it now serves but whom Hoffmann and King are poised to abandon, and for the Kenneth Rouses, whom habeas does not now serve, but whom it should. Dissenting Judge Diana Gribbon Motz tells Kenneth Rouse’s story best:

[A] North Carolina all-white jury convicted Rouse, an African-American, of the robbery, attempted rape, and brutal murder of Hazel Colleen Broadway, a sixty-three-year-old white woman. On the jury’s recommendation, the state judge sentenced Rouse to death. After his appeal was denied, Rouse discovered new evidence that the mother of one member of the jury had been robbed, raped, and murdered by a man who was later executed for the crimes. When all prospective jurors were asked for such information at voir dire, the victim’s son had remained silent.

After serving on Rouse’s jury, this juror reportedly stated that he had intentionally concealed his mother’s tragic death and carefully crafted his other responses to voir dire questions, because he wanted to be on the jury that judged Rouse. Moreover, this juror assertedly expressed intense racial prejudice against African Americans, calling them “niggers” and opining that African Americans care less about life than white people do and that African-American men rape white women in order to brag to their friends.

²²⁶ King & Hoffmann, *supra* note 22, at 15.

²²⁷ *Id.* at 10 (emphasis omitted).

Because the juror did not reveal his own family's tragedy or his virulent racial prejudice, Rouse had no opportunity to object to the juror or challenge his ability to judge and sentence Rouse impartially. Based on this newly discovered evidence, Rouse asserted a jury bias claim on collateral attack in state court, which twice denied his claim without a hearing. Rouse then filed the petition giving rise to this appeal—his first federal habeas petition—but he filed it one day after the Antiterrorism and Effective Death Penalty Act's (AEDPA) limitations period expired. The district court dismissed the petition as untimely, again without a hearing.

As his appeal reache[d the Fourth Circuit], therefore, Rouse ha[d] *never* received, even post-sentence, any opportunity to explore at a hearing the evidence he proffer[ed] of appalling bias on the part of one of his jurors. Of course, a federal court might conclude that this claim lacks merit; but . . . no federal court has ever examined the claim.²²⁸

The en banc Fourth Circuit affirmed the district court's dismissal of Rouse's habeas petition on the ground that it was filed one day past the statute of limitations deadline. With respect to Rouse's plea for equitable tolling based on the fact that the untimely filing of his federal petition was the result of a miscalculation on the part of his attorneys in which Rouse himself played no part, the court rejected Rouse's argument that he should not be punished for his counsel's mistake, explaining that "[f]ormer counsel's errors are attributable to Rouse not because he participated in, ratified, or condoned their decisions, but because they were his agents, and their actions were attributable to him under standard principles of agency."²²⁹

Kenneth Rouse's story cries out for habeas reform.²³⁰ Clarence Moore's story—that of a man whom a federal court freed after fifteen years of incarceration tainted by racial bias—does not. "[A] negative perception" that habeas is "a prime source of vexatious, time-consuming, often abusive, and ultimately meritless litigation" is not the measure of habeas, nor should it be the spur for reform.²³¹ Prisoners—those whose constitutional rights have not been vindicated—should. More habeas, not less.

²²⁸ Rouse v. Lee, 339 F.3d 238, 257–58 (4th Cir. 2003) (en banc) (Motz, J., dissenting), *cert. denied*, 541 U.S. 905 (2004).

²²⁹ *Id.* at 249 (majority opinion).

²³⁰ Rouse's case is capital, and although Hoffmann and King's proposal would not eliminate habeas from capital cases, it does nothing to help Rouse. Moreover, Rouse's case is a good illustration of why the capital/noncapital distinction is untenable; his claim, like most of the claims raised in capital cases, is one that could easily arise in a noncapital case.

²³¹ King & Hoffmann, *supra* note 22, at 15.

